Time is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts

Ayesha Bell Hardaway

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TIME IS NOT ON OUR SIDE: WHY SPECIOUS CLAIMS OF COLLECTIVE BARGAINING RIGHTS SHOULD NOT BE ALLOWED TO DELAY POLICE REFORM EFFORTS

Ayesha Bell Hardaway*

Many view the Violent Crime Control and Law Enforcement Act of 1994 as the best chance for police departments to make meaningful and lasting improvements. That legislation provides the federal government with the authority to investigate and sue local law enforcement agencies for engaging in a pattern or practice of policing that violates the rights of individuals. However, police unions have attempted to intervene in structural reform litigation designed to remedy unconstitutional policing practices. Those attempts have largely been based on employment rights conferred through collective bargaining laws and similar employment protections. The unions argue that the terms of consent decrees crafted to remedy unconstitutional policing impair their interests and rights as detailed in pre-existing terms of collective bargaining agreements. Legal scholars have argued that the collective bargaining terms impede police reform efforts. While courts in some jurisdictions have found that employers cannot unilaterally change a collective bargaining agreement when constitutional violations are at issue, courts have not directly addressed the issues presented when consent decree requirements contradict union contract terms. The Article seeks to fill the gap in the existing literature by providing an empirical analysis of all consent decrees since 1997 to evaluate whether they

* Assistant Professor of Law, Case Western Reserve University. I wish to thank Southeastern Association of Law Schools and Thomas Metzloff for the opportunity to workshop this project at the Annual Conference and the faculty at the University of Toledo College of Law for their feedback at a junior faculty workshop. I also extend sincere gratitude to Jonathan Adler, Robert Strassfeld, Jessie Hill, Scott Bobbitt, Jonathan Entin, Seth Stoughton, Sean Smoot, Raymond Ku, Joseph Slater, Avidan Cover, Sharona Hoffman, Cassandra Robertson, and the Lutie A. Lytle Faculty Writing Workshop for their invaluable feedback. Finally, I am beyond grateful to Andrew Dorchak and Sarajean Petite for their invaluable research assistance.

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had the impact they were intended to have on union contracts. This Article also argues that the unions do not have a legal right to bargain on issues related to use-of-force policies and police accountability because such issues are outside the permissible scope of negotiable issues. Court decisions permitting unions to intervene on the basis of specious interests only aid the delay of much-needed reform efforts. The Article proposes that both state and federal courts should apply the managerial-function standard, which removes policy and public interest issues from collective bargaining, when considering whether unions have a right to oppose settlement agreements in structural police reform litigation. The Article also recommends that state and local governments promulgate ordinances clarifying the scope of public employee collective bargaining rights and the authority of local officials to make management and policy decisions for police departments.

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INTRODUCTION

Twelve-year-old Tamir Rice was playing with a toy gun a friend had given him earlier that day.[1] An observer called 911 to report it, but mentioned that the gun was "probably fake" and that Rice was "probably a juvenile."[2] Officer Timothy Loehmann claimed afterward that he told Rice, "show me your hands," and shot Rice only when he reached into his waistband instead.[3] But a surveillance video shows a different story.[4] Officer Frank Garmback drove the patrol car "so close to Tamir that it made it difficult" to employ tactics recommended by the department's use-of-force policies.[5] Garmback was Loehmann's Training Officer.[6] Loehmann shot Rice within two seconds,[7] a fatal gunshot wound to Tamir's abdomen.[8] A forensic expert said that Tamir did not have time to remove his hands from his pockets, nor hear the police commands before he was shot.[9] In short, he had no opportunity to comply with officer commands. When Tamir's fourteen-year-old sister rushed to his side, the officers tackled her and handcuffed her.[10] Neither Garmback nor Loehmann administered aid to the young boy bleeding in the snow.[11]

Tamir's killing in November 2014 followed the high-profile killings of three other unarmed civilians by Cleveland police officers. Just nine days earlier, Tanisha Anderson—a woman whose family says she was in the midst of a mental health crisis[12]—was placed face down on the concrete in handcuffs by officers.[13] Her death was ruled a homicide.[14] And in November 2012, a full two years before

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1. *See* Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), https://perma.cc/UW5W-9XBV.

2. *Id.*

3. Timothy Loehmann, *Statement* (Nov. 30, 2015), https://perma.cc/N6QU-R795.

4. *Video Shows Cleveland Police Officer Fatally Shoot 12-Year-Old Tamir Rice*, YOUTUBE (Nov. 26, 2014), https://www.youtube.com/watch?v=7Z8qNUWekWE. See note 50 below for the number of times this video and the video of the Walter Scott shooting have been viewed.

5. *See* Loehmann, *supra* note 3; Dewan & Oppel, *supra* note 1.

6. *See* Loehmann, *supra* note 3.

7. *See* Dewan & Oppel, *supra* note 1; Emma G. Fitzsimmons, *Video Shows Cleveland Officer Shot Boy in 2 Seconds*, N.Y. TIMES (Nov. 26, 2014), https://perma.cc/3PCQ-7QA6.

8. THOMAS P. GILSON, CUYAHOGA CTY. MED. EXAM'R'S OFF., MEDICAL EXAMINER'S VERDICT 1 (Dec. 11, 2014), https://perma.cc/FXW2-CLCQ.

9. *See* Michael D. Regan, *Expert: Tamir Did Not Reach for Gun, Countering Officer's Claims*, PBS NEWS HOUR (Dec. 6, 2015), https://perma.cc/Y57B-NPUT.

10. *See* Dewan & Oppel, *supra* note 1.

11. *Id.*

12. *See* Michelle Dean, *'Black Women Unnamed': How Tanisha Anderson's Bad Day Turned Into Her Last*, GUARDIAN (June 5, 2015), https://perma.cc/99A3-MFGE.

13. *See* Cory Shaffer, *Tanisha Anderson Was Restrained in Prone Position; Death Ruled Homicide*, CLEVELAND.COM (Jan. 4, 2015), https://perma.cc/7GUS-TF9L.

14. *See* Brandon Blackwell, *Medical Examiner Releases Full Autopsy Report on Tanisha Anderson, Woman Killed in Cleveland Police Altercation*, CLEVELAND.COM (Jan. 15,

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Tamir and Tanisha's deaths, Malissa Williams and Timothy Russell were chased by Cleveland police for more than 20 miles into East Cleveland.[15] They were trapped in a dead-end parking lot and killed by a barrage of approximately 139 bullets.[16] Contrary to police radio transmissions that shots had been fired at a Cleveland police officer by the occupants of their car, no weapon was ever recovered.[17] Nor was there any scientific conclusion as to whether or not Timothy or Malissa had in fact fired a gun that night.[18] The Ohio Attorney General blamed "systemic failures" within the Cleveland Division of Police for the events leading up to the deadly shooting.[19]

A few years earlier, impacted communities raised concerns around the amount and type of force used by officers in Seattle, Washington.[20] John T. Williams, a Native American woodcarver, was shot four times "during daylight hours" by an officer.[21] Officer Ian Birk chose to use deadly force against Mr. Williams less than five seconds after issuing a command to "put the knife down" while Mr. Williams was facing away from him.[22] It was later disclosed that the pocketknife carried by Mr. Williams was legal to have in public.[23] Eyewitness

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2015), https://perma.cc/2WUQ-6AJA.

15. *See* Crimesider Staff, *5 Cleveland Officers Re-Instated After Deadly 2012 Chase, Gunfire Barrage*, CBS NEWS (Oct. 19, 2017), https://perma.cc/CAV8-WVXQ.

16. *See* OHIO BUREAU OF CRIM. IDENTIFICATION & INVESTIGATION, PROSECUTOR'S SUMMARY 5-7 (Feb. 5, 2013), https://perma.cc/L4KE-CHSK.

17. *Id.* at 11, 41 (stating that interviewed officers all heard radio transmissions alleging suspects fired a weapon at officers, but no firearms or casings were found in subject vehicle).

18. *Id.* at 7.

19. *See* Ohio Att'y Gen. Mike DeWine, Statement as Prepared, Officer-Involved Shooting of Timothy Russell and Malissa Williams 19-20 (Feb. 5, 2013), https://perma.cc/Q32P-JWYQ.

20. *See* ACLU OF WASHINGTON, LETTER TO UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION RE: REQUEST TO INVESTIGATE PATTERN OR PRACTICE OF MISCONDUCT BY SEATTLE POLICE DEPARTMENT (Dec. 3, 2010), https://perma.cc/QZL7-MKCR. Thirty-four community and civil rights organizations signed onto the letter. *Id.*

21. Jim Kershner, *Seattle Police Officer Ian Birk Fatally Shoots Native American Woodcarver John T. Williams on a Downtown Seattle Sidewalk, on August 30, 2010*, HISTORYLINK.ORG (Jan. 18, 2013), https://perma.cc/99NJ-U5BT; Levi Pulkkinen & Casey McNerthney, *No Charges in Woodcarver Shooting by Seattle Police Officer*, SEATTLEPI.COM (Feb. 15, 2011), https://perma.cc/NE33-TQW6.

22. *See Years After Police Shooting, Woodcarver's Brother Remembers the Man He Lost*, NPR (Oct. 7, 2016), https://perma.cc/JD37-5CYS; *see also* Steve Miletich et al., *Seattle Cops Sue Over Department of Justice Reforms*, SEATTLE TIMES (May 28, 2014), https://perma.cc/YRL8-WB4N.

23. *See* Lynda V. Mapes, *Carver's Death a Violent End to a Tormented Life*, SEATTLE TIMES (Oct. 15, 2010), https://perma.cc/MK7X-K8KL (describing the pocketknife as "a legal knife with a 3 inch blade"). *See also* WASH. REV. CODE § 9.41.270(1) (1994) (stating that the unlawfulness of openly carrying knives and other weapons hinges not only on the ability of the item to cause bodily harm but also on whether they are being carried in a manner that "manifests an intent to intimidate another" or create a safety concern). *But see* Casey McNerthney, *Family: Man Shot by Police Was Deaf in Left Ear*, SEATTLEPI.COM (Aug. 31, 2010), https://perma.cc/6VSZ-NG8C.

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accounts differed in critical ways from the information provided by Officer Birk. Contrary to Birk's statements and report, Mr. Thompson had not acted in an aggressive or threatening manner.[24] Other officers in Seattle were captured on video brutally kicking, punching, and verbally attacking juveniles and non-whites in ways that sparked outrage among the local community.[25]

Public outcries for accountability prompted investigations by the Department of Justice in both cities.[26] Reformers have looked to the Violent Crime Control and Law Enforcement Act of 1994[27] as the best option available for police departments to make meaningful and lasting improvements.[28] The Act provides the federal government with the authority to investigate and sue local law enforcement agencies for engaging in a pattern or practice of policing that

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24. *See* Steve Miletich & Jennifer Sullivan, *Officer Birk Quits After SPD Rebuke*, SEATTLE TIMES (Feb. 16, 2011), https://perma.cc/3K46-HGCJ.

25. *See, e.g.*, *Seattle Girl Speaks About Police Beating*, NEWSONE (Mar. 2, 2009), https://newsone.com/123971/seattle-police-beat-15-year-old-girl; *Seattle Cop Punches Teen in Face; Seen on Video*, CBS NEWS (June 16, 2010), https://perma.cc/Y4MC-2WMC; Andrea Nill Sanchez, *Seattle Police Officer Taped Kicking Latino Man in the Head, Pledging to 'Beat the Mexican Piss' Out of Him*, THINK PROGRESS (May 11, 2010), https://perma.cc/4M85-LL5Z; Steve Miletich, *SPD Officer Charged With Assault in Videotaped Kicking*, SEATTLE TIMES (June 6, 2011), https://perma.cc/VHA3-9BWV.

26. *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATT'Y'S OFF. N. DIST. OHIO, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 1 (Dec. 4, 2014), https://perma.cc/984V-8FAR; U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE OF W. DIST. OF WASH., INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 1 (Dec. 16, 2011), https://perma.cc/GH94-HBPS.

27. 34 U.S.C. § 12601 (formerly 42 U.S.C. § 14141). The Act contained numerous other provisions beyond police reform, such as an assault weapons ban, "three strikes and you're out," and "dozens of death penalty offenses." Bill McCollum, *The Struggle for Effective Anti-Crime Legislation—An Analysis of the Violent Crime Control and Enforcement Act of 1994*, 20 U. DAYTON L. REV. 561, 561 (1994). The legislation also contained many sections and provisions designed to demonstrate the American government's tough on crime stance. It simultaneously provided funding to states to incentivize the growth of police departments, lengthened federal criminal sentences, and provided funding to states to build more prisons. *See* Michelle Alexander, *Why Hillary Clinton Doesn't Deserve the Black Vote: From the Crime Bill to Welfare Reform, Policies Bill Clinton Enacted—and Hillary Clinton Supported—Decimated Black America*, NATION (Feb. 10, 2016), https://perma.cc/3E5J-6X2K; *But see* German Lopez, *The Clinton-Backed 1994 Crime Law Had Many Flaws. But It Didn't Create Mass Incarceration*, VOX (Apr. 8, 2016), https://perma.cc/KJ56-Q9JD.

28. Police Reform's Best Tool: A Federal Consent Decree, THE CRIME REPORT (July 15, 2014), https://perma.cc/A5E3-3LGV; John Worrall, *Data Show Consent Degrees Worth Their Cost*, BALT. SUN (June 12, 2017), https://perma.cc/WN78-DR2C (explaining that the cost of consent decrees is worth the expense in the long run); Joshua M. Chanin, *On the Implementation of Pattern or Practice Police Reform*, 15 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y, no. 3. Dec. 6, 2014, at 39, https://perma.cc/6X99-NHZ5. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009) (acknowledging the progress made through passage of Violent Crime Control legislation and arguing that the Department of Justice take a more proactive approach to reforming police departments); Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS PUB. L. REV. 57, 63, 74-75 (2013) (providing definition and explanation of the scope of accountability in policing).

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violates the constitutional rights of individuals. Investigations by the Department of Justice into police practices from 2010 to 2016 led to a record number of reform efforts in American cities.[29] The reform efforts generally require police departments to revise or update their policies and training.[30] Those reform efforts are aimed at creating use-of-force policies that comport with Fourth Amendment standards, increasing a city's ability to hold officers accountable for misconduct, and improving police-community relations.[31]

Unions and other large groups of law enforcement officers, however, challenge the implementation of specific reform efforts in various ways.[32] In Seattle, after public protests and demands for reform led to a consent decree,[33] a

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29. *See* U.S. DEP'T. OF JUSTICE CIVIL RIGHTS DIV., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 19 (Jan. 2017), https://perma.cc/BLP2-52SW.

30. *Id.* at 30.

31. Consent decrees and similar structural police reform remedies often encompass an array of subject matters aimed at improving police departments. Those subject areas range from employee assistance, to use of force, and data collection. Not all of them fall under the category of reform efforts contemplated and highlighted in this Article. That is largely true because, from this author's viewpoint, not all reform efforts fall outside of the purview of bargainable rights that affect the wages, hours, and other conditions of employment. By contrast, as discussed more fully throughout this piece, the three reform initiatives identified here are such that they fall outside of those terms and issues eligible for negotiation through collective bargaining. Stephen Rushin, *Police Union Contracts*, 66 DUKE. L.J. 1191, 1206 (2017) (outlining the need to delineate between "bargainable issues" and "policy" when considering if something should be "managerial prerogative").

32. It is important that the issues raised pertaining to police unions in this Article not be misconstrued. Policing in America is a unique institution for which there are no real parallels or comparisons. No other employee, public or private, is empowered to lawfully infringe on the life and liberty of free citizens in the manner in which law enforcement officers are. Rather than a blanket indictment of unions, this Article only explores issues related to law enforcement. While there could be tangential employment discrimination implications that raise concern, those issues are beyond the scope of this Article.

Several scholars have specifically focused on police unions and the various ways they serve as roadblocks to reform efforts. *See, e.g.*, Catherine Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017) (exploring how labor law can impact organizational change in police unions); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012) (identifying collective bargaining agreements as deterrents to the prevention of unconstitutional police practices); Rushin, *supra* note 31 (analyzing 178 police union contracts to illustrate how they impede accountability efforts); Seth Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2211 (2014) (arguing collective bargaining agreement provisions related to disciplinary grievances impeded the discipline of officers). Walker, *supra* note 28, at 72 (discussing how unions use political leverage to elect mayors who are more inclined to appoint police chiefs who are not committed to leading organizations that insist on accountability).

33. A consent decree, in this context, is a judicially approved and monitored settlement agreement. That agreement comes about after the filing of an action and as a result of negotiations related to the terms. The settlement agreement does not become a consent decree unless and until the court presiding over the litigation makes such an order. Black's Law Dictionary defines 'consent decree' as "[a] court decree that all the parties agree to." *Consent Decree*, BLACK'S LAW DICTIONARY (10th ed. 2014). The U.S. Supreme Court explored the

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group of over 100 individually named officers filed a lawsuit against Seattle city officials, command staff, and the court-appointed Independent Monitor over newly constituted use-of-force policies aimed at reducing incidents of excessive force.[34] The federal lawsuit sought to persuade the court that the new policies unnecessarily increased the physical risk officers face; specifically, that the new policies required officers to disregard their own safety in order to follow the new use-of-force protocol.[35]

As discussed in greater detail throughout the Article, police unions have asserted their collective bargaining rights to formally intervene and disrupt structural reform efforts.[36] Those attempts have been made, in some instances, even though there was no contradiction between the agreements.[37] Civil procedure rules permit interested parties to intervene, or be added as a party, in the litigation when they have a vested interest or right that will be implicated through the adjudication of the matter.[38] Many courts liberally grant motions to intervene filed by unions without regard for whether the union has a well-defined legal interest.[39] Requiring parties to maneuver around the misplaced interests of police unions serves to only confuse and complicate reform efforts.

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contours of consent decrees in *Buckhannon Board & Care Home Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 600 (2001). The majority stated that the nature of "court-ordered consent decrees create the 'material alteration of the legal relationship of the parties'" though consent decrees do not always require a party to admit liability. *Id.* at 604 (quoting Texas State Teachers Ass'n v. Garland Indp. Schl. Dist., 489 U.S. 782, at 792-93 (1989)).

34. Mahoney v. Holder, 62 F. Supp. 3d 1215, 1215-17 (W.D. Wash. 2014).

35. *Id.* at 1218-19. The District Court held, among other things, that the plaintiffs did not have property or liberty interests at stake that would have required they be included in the drafting of the new use of force policies. *Id.* at 1215. The court also held the officers' Second Amendment right to defend themselves were not implicated by the revised policies. *Id.*

36. *E.g.* United States v. City of Los Angeles, 288 F.3d 391, 392 (9th Cir. 2002); Order Granting in Part and Denying in Part Portland Police Association's Motion to Intervene, United States v. City of Portland, No. 3:12-cv-02265-SI, at *1-3 (D. Or. Feb. 19, 2013) (No. 32); Order Denying Motion to Intervene, United States v. City of New Orleans, No. 12-1924, 2012 WL 12990388, at *7 (E.D. La. Aug, 31, 2012); Order Denying Motion to Intervene, United States v. Steubenville, No. 2:97-CV-966, at 1-2 (S.D. Ohio Jul. 23, 1998), https://perma.cc/GJ5R-GUKP. *See also* Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 12-13 (D.D.C. 2001).

37. *See, e.g.*, Order Denying Motion to Intervene, United States v. Steubenville, No. 2:97-CV-966, at 6 (S.D. Ohio Jul. 23, 1998).

38. Fed. R. Civ. P. 24(a).

39. 4 LABOR & EMPLOYMENT LAW § 91.09 (Lexis 2018). In the latter situation, judges overseeing the litigation have determined that the interests of the intervening party were sufficiently covered by the terms of the settlement and that one of the two original parties would adequately represent those interests throughout the implementation of the agreement. *See generally* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 339-40 (1988) (discussing how third party attempts to intervene are not heavily restricted provided they can show they have "any interest that constitutes liberty or property."); Vulcan Soc. of Westchester Cty, Inc. v. Fire Dep't. of White Plains, 79 F.R.D. 437, 439 (S.D.N.Y. 1978) ("[U]nions have an interest within the collective bargaining spectrum").

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Nevertheless, unions have repeatedly attempted to intervene in structural reform litigation. At their core, these attempts assert that the remedial terms of the settlement agreements cannot bind an organization that is not a party to the agreement because doing so unfairly impacts the unions' right to bargain on matters related to the work conditions of members.[40] This Article fills an existing gap in the literature on police unions and reform efforts by providing a legal analysis of what constitutes the scope of wages, hours, and other such work conditions. It also argues that managerial prerogative and public policy limitations render certain subjects not suitable for negotiations. As a result, collective bargaining agreements cannot be permitted to obstruct the implementation of consent decrees aimed at remedying unconstitutional police practices. Allowing such obstructions to continue specifically undermines the remedial purposes of § 12601 of the Violent Crime Control and Law Enforcement Act of 1994[41] and police reforms generally.

This Article proceeds in four Parts. Part I details the origins and persistent problem of police violence. Innumerable individuals and communities have been brutalized by police violence for more than 150 years. Lives are being lost while delays over specious collective bargaining rights are permitted to occur. Part II explores the remedial approaches utilized to address the problem, with an emphasis on the processes of structural reform litigation by which the federal government and non-governmental plaintiffs have sought to remedy and prevent unconstitutional policing in local jurisdictions. This Part includes a survey of all Department of Justice-initiated consent decrees since 1997 to illuminate the scope and frequency of their interrelatedness with union contracts.

Part III explores the historical origins of police unions. It also highlights contradictions between collective bargaining agreements and consent decrees, as well as how courts have analyzed police unions' attempts to intervene in structural reform litigation. This Part concludes by analyzing instances where courts have precluded unions from bargaining on use-of-force and discipline policy provisions. This Article concludes in Part IV by arguing that the imperative nature of police reform efforts and the mandate of managerial prerogatives reforms require accountability through disciplinary processes. This Part offers two solutions: a more detailed and focused application of the right of intervention standard in structural reform litigation and the promulgation of legislative provisions that expressly remove the creation or revision of law enforcement policies related to use of force and accountability from the purview of collective bargaining. Doing so under the doctrine of public employer

40. Order Denying Motion to Intervene, United States v. Steubenville, No. 2:97-CV-966, at 2 (S.D. Ohio Jul. 23, 1998), https://perma.cc/GJ5R-GUKP. *But see* Jurcisin v. Cuyahoga Cty Bd. of Elections, 519 N.E.2d 347, 145 (1988) (finding that "a proposed charter amendment that would establish a police review board to investigate charges of police misconduct and recommend disciplinary action upon a finding of misconduct" did not conflict with "wages, hours and other conditions of employment" for bargaining purposes).

41 34 U.S.C. § 12601.

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managerial prerogatives[42] will avoid confusion and loss of valuable time that ensues when unions assert specious rights in these areas as a form of resistance to structural reform litigation.

I. THE PERSISTENT PROBLEM OF POLICE VIOLENCE

Police power in the United States occupies a hallowed space in our society. The ability of the government to enforce its laws is generally deemed essential to ensuring compliance with norms and order.[43] Indeed, the nation has long permitted police powers to take precedence over the rights of individuals, presumably in the interest of the greater public good.[44] Some have argued that proper training and more oversight are suitable means by which to ensure officer accountability.[45] Racism and racial subjugation, however, are deeply embedded in the foundation of America and their impact on policing has been extensively documented.[46] Thus what has been viewed as the greater public good for the majority has resulted in the oppression and brutal treatment of the marginalized.[47] The longstanding misconduct of law enforcement around the mistreatment of people of color in America as well as the sporadic, less-than-comprehensive attempts by the federal government to address local police abuses have done nothing to remedy the situation. This Part highlights some of the recent incidents between police and civilians that have prompted current concerns around police actions and standards. It also provides a brief account of the efforts, both historical and present, by the federal government to address violent police misconduct.

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42. A managerial prerogative, also sometimes referred to as a management prerogative, is a generally recognized legal principle that decisions regarding policy are within the sole purview of the government and its elected or appointed officials. In jurisdictions where public workers have the right to unionize, such policy decisions are distinctly different from the topics related to conditions of employment that are subject to collective bargaining, i.e. wages, hours, staffing numbers. *See* Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242, at II § 3[a] (2018).

43. GARY GERSTLE, LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT 55-62 (Princeton Univ. Press 2015).

44. *Id.*

45. Charles Blain, *What Does Actual Police Reform Look Like? More Training and More Oversight*, THE HILL (July 5, 2017), https://perma.cc/6BJL-GJTX. *But see* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 2-3 (2009) (discussing how legal remedies have been insufficient to produce long-lasting reforms).

46. *See generally* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1-5 (1968); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 9-10 (2003); Dara Lind, *The Ugly History of Racist Policing in America*, VOX (July 7, 2016), https://perma.cc/4D28-FSR8; Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN (July 27, 2017), https://perma.cc/KNA7-WTLY.

47. *See* Walker, *supra* note 46; Lind, *supra* note 46.

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A. Public Awareness of Extrajudicial Killings by Officers

Images of police violence against marginalized and vulnerable populations, disproportionately affecting African Americans,[48] have captured media attention in recent years. Images of a Staten Island officer choking the last breath out of Eric Garner while other officers stood by and watched were captured on the cellphone of a bystander; Mr. Garner's final words, "I can't breathe," echoed from televisions and news radio stations across the country.[49] Likewise, footage of the extra-judicial killing of Walter Scott as he ran away from Officer Michael Slager in South Carolina,[50] and of twelve-year-old Tamir Rice[51] (in what can only be described as a drive-by shooting) by Officer Timothy Loehmann in Cleveland, was aired heavily by media outlets.[52] These images, along with media coverage of massive protests declaring that Black lives matter in America, riveted the attention of many across the nation.[53] They seemed to awaken the

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48. An updated database detailing the demographics of individuals shot by police maintained by The Washington Post is available at https://perma.cc/AHP6-UCJ3; James W. Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by U.S. Police, 2010-2014*, 107 AM. J. PUB. HEALTH 295, 295-96 (2017); Kendra Scott et al., *A Social Scientific Approach toward Understanding Racial Disparities in Police Shooting: Data from the Department of Justice, 1980-2000*, 73 J. SOC. ISSUES 701, 701-02 (2017); Anthony L. Bui, Matthew M. Coates & Ellicott C. Matthay, *Years of Life Lost Due to Encounters with Law Enforcement in the USA, 2015-2016*, 73 J. EPIDEMIOLOGY & COMMUNITY HEALTH 715, 716-17 (2018), https://perma.cc/7UA3-DHQF; Olga Khazan, *In One Year, 57,375 Years of Life Were Lost to Police Violence*, ATLANTIC (May 8, 2018), https://perma.cc/22F3-3ARF.

49. Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for Police*, N.Y. TIMES (July 18, 2014), https://perma.cc/L4T3-YAZM; Terry Gross, *'I Can't Breathe' Examines Modern Policing and the Life and Death of Eric Garner*, NPR (Oct. 23, 2017), https://perma.cc/F3VV-R9B9.

50. *Large Crowd Attends Funeral for Walter Scott, Man Shot by S.C. Police Officer Charged with Murder*, CLEVELAND.COM (Apr. 11, 2015), https://perma.cc/3A4U-ZUT6; POST & COURIER, *Walter Scott Shooting*, VIMEO.COM (Apr. 7, 2015), https://vimeo.com/124336782 (last visited Dec. 6, 2018) (the video of the Scott shooting on Vimeo has been played 3.9 million times within three years); *Video Shows Cleveland Police Officer Fatally Shoot 12-Year-Old Tamir Rice*, YOUTUBE (Nov. 26, 2014), https://www.youtube.com/watch?v=7Z8qNUWekWE (the Rice shooting has been viewed 1,374,904 times as of December 6, 2018).

51. *See* Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), https://perma.cc/UW5W-9XBV; *Video Shows Cleveland Police Officer Fatally Shoot 12-Year-Old Tamir Rice*, *supra* note 50; Emma G. Fitzsimmons, *12-Year-Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES (Nov. 23, 2014), https://perma.cc/3RWZ-W5R7.

52. *See Video Shows Cleveland Police Officer Fatally Shoot 12-Year-Old Tamir*, *supra* note 4. The Rice shooting was also posted on the New York Times website. *See* Fitzsimmons, *supra* note 51. These particular names are lifted up because of the images captured; this Author acknowledges there are numerous other Black men and women who were brutalized and/or killed by law enforcement during the same timeframe that were not captured on video. *See* MAPPING POLICE VIOLENCE, https://perma.cc/SJY7-GL9X (archived Jan. 16, 2019).

53. *See* Benjamin Mueller & Ashley Southall, *25,000 March in New York to Protest Police Violence*, N.Y. TIMES (Dec. 13, 2014), https://perma.cc/PE8G-6R6W; Diantha Parker, *Protests Around the Country Mark the Moment of Ferguson Shooting*, N.Y. TIMES (Dec. 1,

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collective consciousness of many in both majority and marginalized communities, even though many generations of Americans have known the reality and impact of police violence.

Police brutality, or use of excessive force, is not a contemporary phenomenon born out of a lack of compliance with officer demands. Instead, central to the issue is local governments' inability to ensure their police departments provide services while protecting the rights of all individuals as guaranteed by the Constitution. The increased availability of video footage capturing the actions and decisions of officers during encounters with civilians highlight the need for effective and sustainable reforms. Similarly, heightened attention to the rising costs of settlement, judgment, and associated litigation paid by municipalities has prompted many to ask government and elected officials what is being done to address these ongoing abuses.

More civilians have begun to ask what should be expected and required of police power. These questions largely center on the appropriate use of deadly force,[54] the best way to ensure impartial and effective internal police investigations,[55] and whether officers are fairly held accountable for abuses.[56] The numerous instances of police misconduct across the country highlight the fact that reliance on judicial remedies to address constitutional abuses relating to police misconduct has not been sufficient.[57] Members of the general public are not alone in their concern. Legal scholars and policing experts have offered insight on how municipalities can best train officers on methods and techniques that do not violate the Fourth and Fourteenth Amendment rights of civilians.[58] It is essential that supervision of law enforcement personnel include the ability to effectively implement accountability mechanisms.[59] Experts have argued that

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2014), https://perma.cc/F5EC-6QHQ; Leanne Suter, *Protestors Speak Out Against Police Brutality in Downtown Los Angeles*, ABC (Oct. 22, 2014), https://perma.cc/JP4A-TMZB.

54. Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 638 (2018) ("We want police officers to exercise appropriate care and caution before using deadly force . . . [re]forming the law in a way that encourages the use of deadly force only when it is proportionate and necessary . . . .").

55. Walker, *supra* note 46, at 3, 6-7, 22.

56. *Id.* at 6-7.

57. Harmon, *supra* note 45, at 9 (describing the inadequate and ineffective nature of criminal and civil remedies available to redress and deter police abuses); MAPPING POLICE VIOLENCE, *supra* note 52 (highlighting the numerous instances of police violence); Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS PUB. L. REV. 57, 60-63 (2013) (discussing several reform initiatives throughout history that have failed to have a long-lasting effect).

58. POLICE EXECUTIVE RESEARCH FORUM, CONSTITUTIONAL POLICING AS A CORNERSTONE OF COMMUNITY POLICING 2-12 (Apr. 2015), https://perma.cc/7BXB-BGAF (discussing the various training needs, including those centered on the impact of race on policing, and how the appropriate training is essential to the delivery of constitutional policing).

59. *See* Samuel Walker, *Police Accountability: Current Issues and Research Needs*, 1-2, National Institute of Justice Police Planning Research Workshop (Nov. 28-29, 2006).

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repeated occurrences of constitutional violations are connected to lapses in accountability policies and tactical training.[60] A department must investigate potential instances of misconduct in a timely manner.[61]

B. Police Violence Against Blacks After the Civil War and the Legislation Created to Address It

Throughout American history, the particular violence unleashed by law enforcement against Blacks was often closely connected to attempts by individuals to assert rights conferred upon them by the federal government. Family members and leaders from marginalized communities have consistently sought to end police brutality since the Reconstruction period following the end of formal chattel slavery in America.[62]

Historical records indicate that during Reconstruction local police in Memphis and New Orleans instigated and assisted seething white mobs in murderous attacks on Black communities.[63] Historians have cited hostility from Memphis police officers towards freed Blacks serving in the U.S. military before and after the Civil War and bitterness between "low whites and blacks" as causes of the deadly 1866 riots in that city.[64] Violent beatings, murders, and rapes led by mobs primarily composed of police and firemen against Blacks in the area lasted three days.[65] Early documented accounts of the carnage estimated that angry mobs of white police officers and their supporters killed more than thirty Black men, women, and children, injured fifty, and caused more than $120,000 worth of property damage.[66] The lone police officer killed during the riots accidentally shot himself with his own weapon.[67]

Later that summer, Freedmen sought to secure their right to vote in New

60. *See* Walker, *supra* note 46, at 25, 28-29; Walker, *supra* note 57, at 84 (discussing how training and policy revisions create significant organizational and cultural change within police departments).

61. Walker, *supra* note 46, at 34.

62. Government-sanctioned brutality against Black individuals in fact existed even before Reconstruction in the form of slave patrols, but obviously slaves had no rights as humans, much less citizens. "Slave patrols were vested with virtually unlimited coercive authority . . . to monitor slaves . . . [and] could and did enter slave homes with impunity." Sandra Bass, *Policing Space, Policing Race*, 28 SOC. JUST., no. 1, Spring 2001, 156, 159.

63. *A Visual Timeline of Reconstruction: 1863-1877*, DIGITALHISTORY, https://perma.cc/LB5M-4E9E (archived Jan. 16, 2019). *See also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 261-63 (1st ed. 1984).

64. CHARLES F. JOHNSON & T.W. GILBRETH, THE FREEDMEN'S BUREAU REPORT ON THE MEMPHIS RACE RIOTS OF 1866 (May 22, 1866), https://perma.cc/2LAH-MY4N.

65. FONER, *supra* note 63, at 262.

66. *See* JOHNSON & GILBRETH, *supra* note 64.

67. *Id.*

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Orleans.[68] Those efforts were met with unyielding and barbaric violence.[69] The New Orleans police was comprised largely of ex-Confederate soldiers.[70] Those officers were angry at the Confederacy's defeat and determined to prevent Black delegates participating in the Louisiana Convention.[71] In the name of preserving law and order, the officers and other Confederate sympathizers attacked unarmed Blacks at the convention site. Over the course of the day, nearly 50 Black men died and over 200 others were injured.[72] Federal troops arrived later that day and the killing ceased.[73]

The 42d Congress took up the issue of equal protection for African Americans with the passage of the Second Enforcement Act of 1871, also referred to as the Civil Rights Act of 1871 or the Ku Klux Klan Act. It is now commonly referred to as § 1983.[74] The Court in *Monroe v. Pape* identified one aim of § 1983 to be "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[75] That consideration was the result of communication from President Grant to the members of Congress regarding the unchecked dangers posed to the lives of individuals in some states within the recently constituted Union:

> That the power to correct these evils is beyond the control of State authorities I do not doubt; That the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.[76]

President Grant's comments can be read as absolving state authorities of any

68. Black delegates were "mostly" unarmed and barricaded in the convention site at Mechanics Institute. *New Orleans Massacre (1866)*, BLACKPAST.ORG, https://perma.cc/H6NE-Q4HF (archived Jan. 16, 2019). Witness accounts told of Black men surrendering, waving white flags, and pleading for their lives only to be summarily executed by white officers. There were also reports of Black men being chased down while gravely injured and killed. One such beating was described as "[a] policeman took a club and beat his brains out." Calvin Schermerhorn, *When 'Taking Our Country Back' Led to a Massacre*, DAILY BEAST (July 30, 2016), https://perma.cc/E6CK-55TF. *See also* FONER, *supra* note 63, at 252-63; *300 Unique New Orleans Moments: Mechanics Institute the Center of 1866 Riot*, ADVOCATE (Oct. 17, 2017), https://perma.cc/F25D-ASAW.

69. Schermerhorn, *supra* note 68.

70. FONER, *supra* note 63, at 263; Schermerhorn, *supra* note 68.

71. Schermerhorn, *supra* note 68.

72. *Id.*

73. *Id.*

74. 17 Stat. 13; STEPHEN H. STEINGLASS, § 1983 LITIGATION IN STATE COURTS §2:2 (2018); *see also* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1780 (2016).

75. Monroe v. Pape, 365 U.S. 167, 174 (1961).

76. *Id.* at 173.

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willful neglect and instead implying they were powerless to end the violence against African Americans within their jurisdictions. The remarks from the legislative floor indicate that law enforcement in some states had refused to provide legal protection and remedy to those who sympathized with the Union.[77] It is generally accepted that the legislation was a federal response to lawlessness across the South, and to the local authorities' disregard of, and general permissiveness toward, this lawlessness.[78] § 1983 was originally aimed at addressing private conduct of the Ku Klux Klan (KKK) and similar groups, while prior Reconstruction Acts addressed official abuses and discrimination toward Blacks.[79] It authorized the President "to use the military to protect federal rights" and gave him "temporary power to suspend habeus [sic] corpus."[80] Both civil and criminal remedies were available.[81] Congress removed an amendment to the bill that would have placed an affirmative duty on state and local governments to prevent violence perpetrated by private citizens and organizations.[82]

Section 1 of the Second Enforcement Act of 1871 also contained more commonly known language creating civil liability for those who act "under color of authority of state law" while violating the rights of another.[83] That language survived the demise of other Reconstruction Acts eventually repealed by Congress and lived on to become 42 U.S.C. § 1983.[84] This law provides for monetary remuneration to individuals harmed by officials operating under the color of law.[85] Though plaintiffs now have a substantive right to be compensated for violations they suffered, individual-plaintiff litigation and the concomitant awards of money damages appear to have little impact on reports of widespread police misconduct.[86]

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77. But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples." *Id.* at 178.

78. STEINGLASS, *supra* note 74.

79. *Id.*

80. *Id.*

81. Harry A. Blackmun, *§ 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 5 (1985).

82. See STEINGLASS, *supra* note 74.

83. *See* Blackmun, *supra* note 81, at 6.

84. *Id.* at 10.

85. 42 U.S.C. § 1983; SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS, Chapter 9.1.A., https://perma.cc/8RC2-U67B.

86. *See* Harmon, *supra* note 45, at 9 (discussing the inadequacies of § 1983§ 1983 and the exclusionary rule to create institutional change); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3190-91 (2014) (recognizing existing remedies, including civil litigation, have been inefficient at reducing police misconduct).

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C. The Need for the Creation of the Federal Civil Rights Commission

The Civil Rights Commission, established by the Eisenhower Administration to investigate the status of racism and discrimination in the United States and make recommendations regarding the same, revealed the violence unleashed by law enforcement against Blacks nationwide during the 1950s. The Civil Rights Commission Report of 1961 recounts details of such violence based on testimony it received during its investigation.[87] That testimony details the attack endured by Theotis Crymes, a military veteran from Alabama, which included being rammed off the road by a car behind him and subsequently paralyzed after being shot in the back by the driver of the other car—the local police chief.[88] It also noted how a U.S. Assistant Attorney General found that the evidence in the murder of Luther Jackson by a Philadelphia, Mississippi police officer "did not indicate the violation of a federal statute."[89] Despite the passage of federal laws aimed at remedying discriminatory and brutal police practices, the federal government declined to pursue additional charges against the officer after a local jury found him not guilty.[90]

National tension around the civil rights movement continued to mount in the years after the publication of the Commission's first report. Many are aware of the September 1963 church bombing in Birmingham, Alabama that killed four young girls.[91] But the killing of sixteen-year-old Johnny Robinson by a Birmingham police officer later that day is less well known.[92] Officer Jack Parker shot Johnny in the back with a shotgun as he and a group of friends ran away after being harassed by a truck of people hurling racial slurs, waving a Confederate flag, and throwing bottles.[93] Officers on the scene offered differing accounts in claiming that the killing was an accident.[94]

Johnny's family received no explanation of why the officer shot him.[95] There were no allegations that Johnny committed a crime, was fleeing the scene of a crime, or posed a threat to officers or others. Yet, neither a state nor a federal grand jury issued an indictment for the killing of the young man.[96] Recently, the Department of Justice pointed to the racial composition of the all-white police force, the all-white jury, and Johnny's juvenile record to explain why the officer

87. Mary Frances Berry, AND JUSTICE FOR ALL 38-39 (1st ed. 2009).

88. *Id.*

89. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., NOTICE TO CLOSE FILE (Apr. 18, 2010), https://perma.cc/Q29H-UK2X.

90. *Id.*; 42 U.S.C. § 1983.

91. *See* Carrie Johnson, *Johnny's Death: The Untold Tragedy in Birmingham*, NPR (Sept. 15, 2010), https://perma.cc/K7PF-SRX7.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

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was not charged.[97] Judicial accountability during this era continually proved a non-existent avenue for securing police accountability and, as a by-product, a more humane and just form of policing.

D. Congress Backs Federal Structural Reform Litigation by Passing the Violent Crime Control and Law Enforcement Act of 1994

The federal government's reliance on local government and the judiciary to address and remedy instances of unconstitutional policing became politically untenable in 1991.

Congressional hearings exploring issues of police misconduct and accountability were held in late 1991 after the barbarically heinous beating of Rodney King.[98] In March of that year, Mr. King was beaten with batons, stomped, kicked, and tased by three patrol officers and a sergeant from the Los Angeles Police Department following a high-speed chase. The brutal beating was captured on video, broadcast by news stations, and shocked many across the nation.[99] Yet, despite the denunciation of the officers' conduct and the evidence portraying the acts of the officers, a state trial resulted in the acquittal of the defendants.[100] The defendants were eventually tried in federal court for criminally violating Mr. King's constitutional rights; that trial resulted in the conviction of one defendant for use of excessive force and one defendant for failing to intervene to stop the criminal conduct; the other two officers were acquitted.[101]

Testimony from policing experts and law enforcement officials was offered during the congressional hearings to illustrate that the incident that left Mr. King severely injured was not an isolated occurrence.[102] The committee heard testimony regarding police abuses across the country.[103] The members of the 102d Congress had to "close this gap" in federal law that left the federal government powerless to institute an action that would protect the constitutional rights of individuals and prevent local police departments from continued acts of abuse.[104] Eradicating such instances was the stated goal of the bill proposed in

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97. *Id.*

98. H.R. REP. NO. 102-242(I), at 135 (1991).

99. *See* William L. Solomon, *Images of Rebellion: New Coverage of Rodney King*, 11 RACE GENDER & CLASS 23, 25-27 (2004).

100. *See* Seth Mydans, *The Police Verdict: Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES (Apr. 30, 1992), https://perma.cc/D84Y-PNJB.

101. *Koon v. United States*, 518 U.S. 81, 88 (1996).

102. H.R. REP. NO. 102-242(I), *supra* note 98, at 135-36.

103. *Id.* The legislative history of the Police Accountability Act details conduct of officers and departments in New York City, Boston, Los Angeles (both the city police department and county sheriff), Newark, the District of Columbia, and Reynoldsburg, Ohio. *Id.*

104. H.R. REP. NO.HR 102-242(I), *supra* note 98, at 138.

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1991. The effort was unsuccessful.[105] It was not until 1994 that a drastically reduced bill was passed permitting the federal government to enjoin and remedy patterns or practices of police misconduct rising to constitutional violations.[106]

The explicit aim of § 12601 is to authorize the United States government to bring civil suits against any government entity to enjoin and remedy any pattern or practices of unconstitutional policing committed by law enforcement agencies under the control of the subject municipalities or states.[107]

The Attorney General of the United States is empowered to seek "equitable and declaratory relief" for communities besieged by police misconduct.[108] In order to do so, the Attorney General, through his or her designees, conducts a full investigation of the police practices and policies of the subject jurisdiction.[109] Not all investigations result in a lawsuit.[110] But in those instances where the Department of Justice finds a pattern or practice of police misconduct, the federal government has the power to file suit. That litigation, should it result in a full trial on the matter, will determine whether the allegations made by the Department of Justice are merited and if the local government should be held judicially liable for the alleged violations. The resolution of the matter via settlement agreements, or consent decrees, occurs when the parties forgo litigating the merits of the Department of Justice finding of unconstitutional policing. The aim of the reform process is to ensure that the subject law enforcement agency delivers policing in a manner that comports with the rights conferred by the Constitution to individuals that agency serves.[111] Outcome measures are used throughout the reform process to gauge the success of the revised trainings, policies, and utilization of additional resources.[112]

As discussed below, certain consent decrees drafted to remedy and reform local police practices contain terms aimed at decreasing the impact that obstructive collective bargaining provisions can have on the process.

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105. Police Accountability Act of 1991, H.R. 2972, 102d Cong. (1991). The bill was introduced by Congressman Don Edwards (D-10th CA), who was joined by ten of his colleagues as co-sponsors. The legislation never made it out of committee.

106. 34 U.S.C. § 12601 (2017). For example, the Act introduced "three strikes" and added death penalty offense, whereas previous legislation featured a crime victims bill of rights. JOANN O'BRYANT & LISA SEGHETTI, CONGRESSIONAL RESEARCH SERVICE, CRIME CONTROL: THE FEDERAL RESPONSE 2-3 (2002), https://perma.cc/L78D-34KS.

107. 34 U.S.C. § 12601.

108. *Id.*

109. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 29, at 5-15.

110. *Id.* at 5-8.

111. *Conduct of Law Enforcement Agencies*, U.S. DEP'T OF JUST., https://perma.cc/9DAJ-S9UM (archived Jan. 16, 2019). The Department of Justice Civil Rights Division, Special Litigation Section protects the rights of people who interact with state or local police and acts when it finds systemic situations in which people's rights are infringed.

112. *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 29, at 23-25.

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II. ROUTES TO STRUCTUAL REFORM LITIGATION IN POLICING

Various attempts have been made to ensure police departments deliver services that are free of unnecessary or excessive force. This Part discusses notable judicial decisions brought by civilians as well as a recent class-action suit brought in New York regarding the New York Police Department's stop-and-frisk practices. This Part concludes with a description of the Department of Justice's reform efforts through pattern and practice investigations as conferred upon the federal government by § 12601.

A. How the U.S. Supreme Court Refused to Address Deadly Police Tactics

Individual citizens' and community organizations' suits against police departments for alleged police misconduct have been generally rebuffed by federal courts. In two notable cases, the U.S. Supreme Court limited the ability of individuals to secure injunctions[113] and to assert standing[114] in efforts to address police misconduct through judicial intervention.

In *Rizzo v. Goode*, the Berger Court considered an appeal by City of Philadelphia officials in a matter that initially began as two class-action lawsuits under § 1983.[115] In the first suit, referred to by the lower court as *Goode*, the plaintiffs alleged that the constitutional rights of African Americans in Philadelphia were repeatedly violated by officers without any disciplinary ramifications, and even under the implicit authorization of supervisors and elected officials.[116] Plaintiffs in the first suit sought to have certain identified officers disciplined or fired for their alleged misconduct and to secure an order requiring the City to create a mechanism by which to effectively handle civilian complaints.[117] The second suit was filed by the Council of Organizations on Philadelphia Police Accountability and Responsibility (COPPAR); it alleged systematic discrimination against African Americans and arose from the treatment of Black Panther members who were allegedly illegally raided, brutally arrested, strip-searched, and held with excessive bail.[118] COPPAR sought to enjoin the conduct of the police department and to have the court appoint a special master to oversee the implementation of a court-ordered decree.[119] The district court found that Philadelphia Police Department had an

113. Rizzo v. Goode, 423 U.S. 362, 376, 378-80 (1976).

114. City of Los Angeles v. Lyons, 461 U.S. 95, 105, 109-10 (1983).

115. *Rizzo*, 423 U.S. at 364-67, 370.

116. Council of Orgs. on Phila. Police Accountability & Responsibility v. Rizzo, 357 F. Supp. 1289, 1291 (E.D. Pa. 1973).

117. *Id.*

118. *Id.* at 1291, 1307.

119. *Id.* at 1291. It is important to note that plaintiffs in COPPAR did not consider the establishment of a citizen complaint board alone to be enough to adequately redress the police misconduct at issue. It was their position that having a process by which to "air" complaints did nothing to correct misconduct within the department. Instead, the organization sought to

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"unacceptably high number of instances" of unconstitutional conduct, and issued a consolidated order requiring the City to develop a comprehensive plan that, among other things, addressed racial bias.[120]

The Supreme Court reversed the ruling of the lower court on essentially three bases.[121] First, they found the individual plaintiffs from the initial actions lacked the requisite case or controversy to justify the lower court's grant of injunctive relief.[122] The determination by the Court that the respondents failed to meet the jurisdictional requirement could have ended the analysis. But it went on to find that § 1983 could not be used to hold state officials liable for misconduct or civil rights violations they did not actively or affirmatively promote.[123] Finally, the Court held that federalism and equitable restraint principles precluded the District Court from interfering with police operations through the injunction process.[124]

By emphasizing the absence of proof that the named defendants actively committed or promoted misconduct, the Court improperly elided the responsibility local government officials bear to ensure their police forces adhere to the Constitution's requirements. The lower court had outlined the duties of each named defendant as codified by the City of Philadelphia Charter.[125] That outline identified each defendant's connection to, and authority over, the police department and its officers.[126] Additionally, the Court's § 1983 analysis illogically undercut the plain reading and purpose of the statutory language, "[e]very person who, under color of . . . custom,"[127] which necessarily implicates governmental policies and procedures. Nothing in the text of the statute or legislative history supports the Court's requirement that the named defendants could only be those accused of personally committing the aggrieved misconduct. In *Monell v. Department of Social Services,* the Court held § 1983 to be a suitable legal avenue to sue local officials in their official capacities where the custom of local government deprived individuals of constitutional rights.[128] This subsequent decision is now routinely used to assert that local government officials can be held liable for failing to train or correct the conduct of subordinates that results in constitutional violations; an affirmative departmental

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have the federal court establish a process by which to stop Fourth Amendment violations including illegal searches, arrests, beatings and harassment. *See* Donald Janson, *U.S. Court Is Asked to Ban Abuses by Philadelphia Police and Name an Enforcer*, N.Y. TIMES (Mar. 10, 1971), https://perma.cc/3QPA-K24U.

120. *Council of Orgs. on Phila. Police Accountability,* 357 F. Supp. at 1321.

121. *Rizzo*, 423 U.S. at 362-63.

122. *Id.* at 363.

123. *Id.* at 363, 373-74.

124. *Id.* at 379-80.

125. *Council of Orgs. on Phila. Police Accountability*, 357 F. Supp. at 1292.

126. *Id.*

127. 42 U.S.C § 1983 (2017).

128. 436 U.S. 658, 690-91 (1978).

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policy that violates one's rights is not required.[129]

After *Monell*, however, the Court continued to deny injunctive relief to plaintiffs injured because of unconstitutional police practices.[130] Adolph Lyons was strangled until he lost consciousness; his injuries caused him to spit up blood and dirt and also defecate and urinate on himself following a brief stop by two Los Angeles police officers for a burned-out taillight.[131] It was uncontroverted that the deadly force used on Mr. Lyons was not in response to him posing a threat of serious injury or death to officers.[132] Also uncontroverted was that Los Angeles Police Department prior policy and practice permitted this use of disproportionate lethal force.[133] Mr. Lyons alleged that he suffered several constitutional violations[134] and sought declaratory, monetary and injunctive relief for his injuries.[135] The district court denied Mr. Lyons' § 1983 claims for declaratory and injunctive relief.[136]

The Ninth Circuit held that Mr. Lyons' claims were wholly distinguishable from *O'Shea* and *Rizzo* because the threat of future injury was immediate for Mr. Lyons and every local citizen due to the fact that the city permitted the use of strangleholds even when an officer was not in danger, and that the odds of future

129. City of Canton v. Harris, 489 U.S. 378, 388 (1989) (holding that failure to train is only actionable where it represents a "deliberate indifference"); Connick v. Thompson, 563 U.S. 51, 54, 71 (2011) (holding a single Brady violation that resulted in the wrongful conviction of Thompson was insufficient to meet the deliberate indifference standard required to recover damages under § 1983).

130. Los Angeles v. Lyons, 461 U.S. 95, 113-14 (1983) (Marshall, J., dissenting).

131. *Id.* at 114-15.

132. "Lyons, stopped for a traffic violation, neither resisted nor threatened the LAPD officers." Benjamin I. Whipple, Comment, *The Fourth Amendment and the Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 28 SAN DIEGO L. REV. 177, 187 (1991).

133. Lyons v. Los Angeles, 615 F.2d 1243, 1247 (9th Cir. 1980).

134. Mr. Lyons alleged that the LAPD violated his First Amendment rights by exacting prior restraint on his speech, his Fourth Amendment right against unwarranted seizure, his Eighth Amendment right to be free of cruel and unusual punishment, and his Fourteenth Amendment right to due process. *See id.* at 1244. He alleged that the chokehold was used against him in a matter of seconds following his complaint about the pain of the rough, strong arm tactics against him during what should have been a routine traffic stop. *Lyons*, 461 U.S. 95, 114-15. In the various court opinions related to Mr. Lyons' case, there is no assertion that the strangleholds were used in response to a threat posed by Mr. Lyons to officers during the stop. *Lyons*, 615 F.2d. 1243, 1244 (9th Cir. 1980); *Lyons*, 656 F.2d 417, 417-18 (9th Cir. 1981); *Lyons*, 453 U.S. 1308, 1309 (1981); *Lyons*, 461 U.S. 95, 97 (1983).

135. *Lyons*, 615 F.2d. at 1244.

136. *Id.* The district court provided no written findings or conclusions of law. *Id.* at 1246. In consideration of the appeal, the Ninth Circuit presupposes that the lower court summarily dismissed Mr. Lyons' claims for the reasons asserted by the defendants in their Motions for Summary Judgment. According to the Ninth Circuit, those filings asserted that Mr. Lyons had not presented a case or controversy qualified to be heard in federal court as required by *Rizzo v. Goode*, 423 U.S. 362 (1976), and *O'Shea v. Little*, 414 U.S. 488 (1974), because he had not adequately shown that he was likely to suffer "real and immediate future injury." *Id.*

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injury were greater in *Lyons* due to the high-traffic nature of Los Angeles.[137] The court, in its remand,[138] placed great emphasis on the fact that Mr. Lyons was not requesting broad, sweeping structural relief that required federal court supervision over a state entity for an extended period of time.[139] The Ninth Circuit refused to apply *Rizzo* and *O'Shea* to Mr. Lyons's case because, in its view, doing so would mean the Supreme Court "meant to make it nearly impossible to challenge unconstitutional police practices."[140] The court aptly recognized that doing so would "only encourage a disrespect for both the law and the police who enforce that law."[141]

The U.S. Supreme Court heard the merits of Mr. Lyons's case over six years after his traffic stop and injury.[142] The Los Angeles Police Department had caused the death of at least sixteen motorists, twelve of them being Black men, since 1975.[143] Nevertheless, the Court reversed, finding that the past wrongs committed by officers failed to establish that Mr. Lyons had standing to seek injunctive or declaratory relief.[144] Relying on a constricted and tortured view of when a case or controversy is present, the Court opined that the requirement could only be met if Mr. Lyons could prove that he would be stopped again and that *all* LAPD officers *always* choke *all* people they encounter "whether for the purpose of arrest, issuing a citation, or for questioning."[145]

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137. *Id.* at 1246.

138. On remand, the district court issued a preliminary injunction against the City of Los Angeles in regards to its use of strangleholds when officers are not faced with the threat of death or serious bodily harm. The order required the LAPD to develop a training program on the appropriate use of chokeholds; it also required the city to create regular reporting requirements on the use of strangleholds by officers and provide record keeping to the court upon request. Los Angeles v. Lyons, 453 U.S. 1308, 1309-10 (1981).

139. *Lyons*, 615 F.2d at 1246, 1247.

140. *Id.* at 1250.

141. *Id.*

142. Los Angeles v. Lyons, 461 U.S. 95, 97 (1983). The Supreme Court initially declined to grant certiorari when the City of Los Angeles appealed the district court's decision on remand in *Lyons I*. 449 U.S. 934 (1980). At that time, three Justices (White, Powell, and Rehnquist) were in favor of hearing the case because they considered *O'Shea* and *Rizzo* to have made it clear that "federal courts are not the forum in which dissatisfied citizens may air their disagreements with government policy." *Id.* at 936 (White, J., dissenting). Following the Ninth Circuit's decision in *Lyons II* (where they found that the district court did not abuse its discretion in enjoining the city's use of strangleholds), Justice Rehnquist got a second bite of the proverbial apple and, in his role as Circuit Justice, issued a stay of the injunction and permitted the LAPD to resume its use of strangleholds. 453 U.S. at 1308, 1312. The Supreme Court granted certiorari for *Lyons II* on February 22, 1982. 455 U.S. 937.

143. *Lyons*, 461 U.S. at 115-16.

144. *Id.* at 105.

145. *Id.* at 105-06. The Court also states that a case or controversy could be established if Mr. Lyons showed that he would certainly be stopped by the police again and that City officials authorized or ordered the officers' conduct. They ignored the fact that the city had, indeed, authorized the unconstitutional conduct. They also showed complete disregard for the lives of motorists, particularly Black men, by ignoring the concrete data capturing the number of Black men strangled to death by LAPD during the pendency of the litigation demonstrated

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This incredible standard requires individuals seeking adequate remedy for the violation of their constitutional rights to meet the impractical and unnecessary requirement of showing that they personally will be in the same situation with law enforcement. The Court requires some futuristic, concrete proof to show that every citizen will be strangled by police during an encounter. It ignores the wrong created during the initial stop and permits municipalities to have policies that clearly create unwarranted danger to the lives of civilians. Of equal importance, it signals to police departments that the federal judiciary will not serve as a guardian of either the Constitution or the lives the Fourth and Fourteenth Amendments aimed to protect. The holding in *Lyons* amounts to the majority of the Justices who heard the case refusing to perform their Article III duties. They used a recently-fashioned jurisdictional hurdle[146] to allow them to turn a deaf ear to those endangered by unconstitutional police practices.

In *Lyons* and *Rizzo*, the Court rejected plaintiffs' request for injunctive relief. And though the plaintiffs in *Rizzo* presented the trial court with evidence and data related to the pervasive misconduct within the Philadelphia Police Department, the Court held that the district court erred when "it injected itself by injunctive decree into the internal disciplinary affairs" of a local police department.[147]

These and other cases involving pervasive police misconduct made clear that the Court deemed its duty to solely be to make municipalities pay damages for their unconstitutional practices, and that ordering remedies aimed at reforming police departments was not within their authority. The repeated dismissive maligning of injunctive efforts to stop the practices has rendered the Court complicit in the continued abuses and violations. The passage of § 12601 in 1994 should be seen as an explicit declaration by Congress that widespread violations of individual constitutional rights merit intervention by the federal government and its judiciary and any attempts to subvert those efforts should be denied.

At present, there are only two avenues to address systemic police misconduct. Those two avenues are large-scale class-action suits and investigations initiated by the Department of Justice. Notwithstanding those earlier court decisions, federal courts have redressed pervasive unconstitutional policing outside of § 12601 litigation in recent years. Non-governmental organizations have assisted plaintiffs in filing suits aimed at reforming police

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this likelihood. *Id.* at 115-16.

146. *Id.* at 127, 130. Additionally, it is not lost on this Author that both the majority and dissenting opinions in *Lyons* identified varying concerns surrounding federalism and the intrusion of federal courts into the daily activities of large police departments. In many ways, these concerns implicate the type of federal court supervision required under Section 12601 litigation and consent decrees. However, presuming Section 12601 meets the proportional and congruent requirements of Section 5 of the Fourteenth Amendment, the passage of the Violent Crime Control and Law Enforcement Act has now placed injunctive and equitable relief aimed at reforming police departments squarely in the lap of the federal judiciary.

147. Rizzo v. Goode, 423 U.S. 362, 380 (1976).

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practices.

The Center for Constitutional Rights, along with other counsel, filed a class-action lawsuit against the New York Police Department alleging that the department conducted routine stops of individuals in a manner that unconstitutionally targeted Blacks and Hispanics.[148] That initial suit, *Daniels v. City of New York*, resulted in a settlement agreement with the city to create an anti-racial profiling policy, document each stop, conduct community forums, and perform quarterly audits to update plaintiffs regarding the number of stop and frisks conducted by officers.[149] The conditions of the settlement agreement were mandatory for four years.[150] The initiation of the below case was part of the evolution of stop-and-frisk issues born out of the persistent issues within the New York Police Department (NYPD) following the audits conducted pursuant to the *Daniels* settlement.[151]

More than nine years after the filing of the complaint in *Daniels*, two separate plaintiffs filed suit regarding the racial profiling violations committed by officers on both public and private property. The private suit, *Ligon v. City of New York*, was filed in response to the city's deployment of officers outside of private apartment buildings in the Bronx.[152] Plaintiffs alleged they were routinely, and without legal justification, stopped and questioned under the suspicion of trespass, in violation of the Fourth Amendment. *Floyd v. City of New York*[153] was the "stop and frisk" case widely covered by the national media.[154] That class-action suit involved allegations that the NYPD violated the Fourth Amendment rights of Blacks and Hispanics through their stop and frisk policy and practices as applied to those individuals on the public streets of New

148. *Daniels v. City of N.Y.*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001). This suit followed the killing of Amadou Diallo, an unarmed man, as the result of 41 shots fired on him by officers while he stood in the entranceway of his apartment building. *See Daniels, et al. v. the City of New York*, CENTER FOR CONSTITUTIONAL RIGHTS, https://perma.cc/JNR9-8STC (archived June 3, 2019).

149. David Postel, *Case Profile: Daniels v. City of New York*, CIVIL RIGHTS LITIG. CLEARINGHOUSE (Nov. 11, 2013), https://perma.cc/B4MZ-Y6RL.

150. *Id.*

151. For the role of the *Daniels* litigation and additional information on the evolution of stop-and-frisk, see Michael D. White, et al., *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9 (2016).

152. 925 F. Supp. 2d 478, 484-85 (S.D.N.Y 2013).

153. *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

154. *See, e.g.*, Margot Adler, *At 'Stop-And-Frisk' Trial, Cops Describe Quota-Driven NYPD,* NPR (Mar. 21, 2013), https://perma.cc/ZV34-5T2G; Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), https://perma.cc/DP8A-VCPJ; Leroy Downs, *We Won Against Stop-and-Frisk, but Policing in New York Needs to Change*, GUARDIAN (Aug. 12, 2013), https://perma.cc/RV6S-NMHM; Annette Dickerson, *We Want Our City Back*, AMSTERDAM NEWS (Mar. 18, 2013), https://perma.cc/SDJ8-PXNK.

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York City.[155] The federal district court held the city liable in both instances,[156] granted the plaintiffs' requests for injunctions, and issued orders designed to remedy the unconstitutional practices within the department.[157]

Class-action litigation initiated and paid for by civil rights organizations, such as in *Daniels*, *Ligon*, and *Floyd*, has its drawbacks. Large scale, multi-year litigation requires an enormous amount of resources. The work of such organizations is far from guaranteed without charitable donations and grant funding. This type of ad hoc funding makes it unlikely that sustained and lasting reforms could be made by replicating these class-action suits in other jurisdictions across the country where police misconduct has been documented. Reforming the unconstitutional conduct of officers should not be left to the heroic efforts of a civil rights organization such as the Center for Constitutional Rights. As discussed in greater detail below, attempts were made by local police unions to intervene in *Floyd* following the court's imposition of remedial orders.

Putting aside the need for ad hoc fundraising on a case by case basis, the federal government's presence and responsibility to uphold the Constitution places the duty to ensure constitutional policing squarely in their lap. § 12601 codifies that duty.

B. Reforms and Accountability through § 12601

Federal laws have been passed to prohibit state-sanctioned constitutional violations in the areas of education,[158] housing,[159] voting,[160] disability,[161] and employment.[162] Civil rights legislation passed by Congress during and immediately after Reconstruction denounced discrimination by state actors.[163] That legislation was not enough to prompt the Supreme Court to address persistent police abuses, as made clear by the holdings in *Rizzo* and *Lyons*. The 103d Congress passed new legislation designed to address the pervasive patterns or practices of police misconduct that persisted and provide a judicial remedy.[164] This subsection proceeds in two parts. First, it details how the Department of Justice exercises its authority under § 12601. Second, it examines language from Department of Justice consent decrees to discuss the quantitative impact of consent decrees on collective bargaining agreements.

Litigation and settlement agreements negotiated between the Department of

155. *Floyd*, 959 F. Supp. 2d. at 658-60.
156. *Id.*
157. *Id.* at 672, 687-88.
158. 42 U.S.C. § 2000c-6 (2017).
159. 42 U.S.C. § 3604.
160. 52 U.S.C. § 10301(a) (2017).
161. 42 U.S.C. § 12112(a).
162. 42 U.S.C. § 2000e-2.
163. 1866 Civil Rights Act, 14 Stat. 27-30 (1866).
164. 42 U.S.C. § 14141.

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Justice and local governments to reform police departments are the typical and commonly known consent decrees ordered by federal courts. The Department of Justice, under the authority of the Violent Crime Control and Law Enforcement Act of 1994, has conducted investigations into the practices of police departments across the country.[165] The result of those investigations have been memorialized in what is commonly referred to as "findings letters."[166] In instances where a pattern or practice of police misconduct has been found, those letters generally contain language referring to the type and manner of constitutional violations committed as a result of the misconduct.[167]

Pattern or practice investigations conducted by the Department of Justice generally take three different paths. In the first instance, the Department may conduct an investigation, find no pattern of constitutional violations, and conclude that no further action is warranted.[168] Alternatively, at the conclusion of its investigation, the Department may identify some relatively discrete issue that the local department can remedy through use of a "memorandum of agreement."[169] This type of agreement does not involve oversight by a federal court.[170] Finally, the scope and pervasive nature of constitutional violations revealed by the Department can lead it to conclude that the subject department has engaged in a pattern or practice of misconduct in violation of the U.S. Constitution and its concomitant federal laws.[171] If so, the Department of Justice works with the jurisdiction on a reform agreement and—if the jurisdiction does not agree on needed reforms—litigation is typically initiated through the filing of a civil complaint in federal court.[172] When the Department of Justice finds a pattern or practice of unconstitutional policing, the subject local jurisdiction is faced with a decision whether to litigate the merits of those findings or to enter into a settlement agreement with the federal government regarding the mode and manner by which the noted unconstitutional practices will be rectified.[173]

165. *See* U.S. DEP'T. OF JUSTICE CIVIL RIGHTS DIV., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 3 (Jan. 2017), https://perma.cc/BLP2-52SW.

166. *Id.* at 15.

167. *See id.* at 15-16.

168. *See id.* at 15.

169. *Id.* at 21.

170. *Id.*

171. *Id.* at 1.

172. *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 165, at 18-19 (only six of out dozens of cases required civil litigation instead of reform agreements).

173. *Id.* Reform agreements are more common than civil litigation. *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 165, at 18 (highlighting dozens of reform agreements versus only six involving civil litigation). Some jurisdictions, however, still choose to litigate. *See generally* United States v. Johnson, 28 F. Supp. 3d 499 (M.D.N.C. 2014) (granting partial summary judgment to defendant Sheriff against the United States and its Fourth Amendment claims regarding alleged unconstitutional traffic stops); United States v. Johnson, 122 F. Supp. 3d 272 (M.D.N.C. 2015) (finding that the United States failed to meet its burden under U.S.C. § 14141).

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Settlement negotiations are undoubtedly contentious and rife with clashing views as to the scope of the proposed reforms. However, those reforms move from the category of being proposed reform to "final and binding" once the federal court assigned to the action approves the terms of the settlement agreement as a consent decree. That endorsement requires an analysis of the process and proposed reforms. The court must be satisfied, through the process of a fairness hearing, "that the agreement is 'fair, adequate, and reasonable' and 'is not illegal, a product of collusion, or against the public interest.'"[174] It is at this point that the parties become bound to the terms of the agreement and those terms are memorialized in what is commonly referred to as a consent decree.

Once a federal court has determined that the process culminating in the settlement agreement was fair, the aim and purpose of what now becomes a consent decree is to rectify the constitutional violations confirmed during the investigation and findings phases of the § 12601 action. Those remedies are delineated in the terms of the decree and the successful implementation of those terms fall under the authority and purview of the federal judiciary.[175] Arguably, not all of the terms of the settlement agreements are specifically designed to remedy constitutional violations. However, those terms pertaining to use of force, accountability, and improving relations between officers and the communities they serve are integral to preventing continued unconstitutional practices.[176] Revising policies and procedures aimed at increasing accountability for officer misconduct and improving community police relations are all hallmark functions of structural reform litigation. The complex and multi-faceted nature of those efforts require the parties to be committed to a multi-year process. Motions to intervene and labor-related grievances filed by police unions in an effort to assert their collective bargaining rights or simply obstruct the process have delayed reform implementation efforts.

Police unions—on both the local and national levels—have voiced their concern regarding the intervention of the Department of Justice into local

174. *See* United States v. Baltimore Police Dep't., 249 F. Supp. 3d 816, 818 (D. Md. 2017) (quoting United States v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999)).

175. Still yet gaps in empirical studies regarding the effectiveness of reform efforts initiated by settlement agreements. It remains unclear, however, whether these interventions have produced the fully desired effect within the subject jurisdictions. Some law enforcement agencies have continued to be dogged with new waves of complaints related to police misconduct after the purported successful implementation of all terms of an agreement. The success of others has not yet been supported by empirical evidence. Moreover, questions remain—even within the parties of negotiated settlement agreements—regarding the permissible scope and breadth of reform efforts. Joshua M. Chanin, *Examining the Sustainability of Pattern or Practice Police Misconduct Reform*, 18(2) POLICE Q. 163, 185 (2015) (implementation of settlement terms does not "in and of itself guarantee meaningful, institutionalized change").

176. Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS PUB. L. REV. 57, 74-78 (2013).

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policing matters.[177] This concern was largely expressed through union endorsements for 2016 presidential candidate Donald Trump, who promised to roll back the use of federal consent decrees and who voiced support for a return to "law and order" policing.[178] That mode of policing has been noted as supportive of aggressive policing tactics that have enormous potential to run afoul of the Fourth Amendment.[179] Less than three months into the Trump administration, United States Attorney General Jefferson Beauregard Sessions III issued a memorandum to all heads of the Department of Justice in support of expanded police authority.[180] His memo states that "[l]ocal control and accountability are necessary for effective local policing," and that "[i]t is not the responsibility of the federal government to manage non-federal law enforcement agencies."[181] The memorandum goes on to charge Sessions' Deputy and Associate Attorney Generals to evaluate current Department of Justice practices and activities—including "existing or contemplated consent decrees" for

177. *See* Richard Pérez-Peña, *Police Unions Hail Trump's Easing of Scrutiny. Local Officials Worry*, N.Y. TIMES (Apr. 4, 2017), https://perma.cc/X4BL-X5R4; Ted Goodman, *Three Largest Police Union Endorse Trump in Crucial Battleground State*, DAILY CALLER (Oct. 5, 2016), https://perma.cc/H7BD-YHXC. The article discusses the endorsement of the National Fraternal Order of Police for then-candidate Trump. *Id.* The endorsement came after Trump criticized President Obama for supposedly politically driven attacks against police officers. *Id.* While it is improper to assume one can accurately determine the basis for the assertion, nineteen pattern and practice reform agreements were negotiated between 2012 and 2016 under President Obama. *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 165, at 1; Christian Boone, *In Trump Administration, Many Police See an Ally*, AJC (Aug. 10, 2017), https://perma.cc/R35C-Y22A.

178. *See* Eric Heisig, *Cleveland Police Union Head Steve Loomis Is Fond of Donald Trump, and Has Shown It Over the Past Year*, CLEVELAND.COM (Apr. 4, 2017), https://perma.cc/V54X-VHX3; Ted Goodman, *supra* note 177; Christian Boone, *supra* note 177.

179. When President Nixon assumed office in 1969, his administration pursued a law-and-order theme, with a focus on riot control and domestic intelligence. Pamela Irving Jackson and Leo Carrol, *Race and the War on Crime, the Sociopolitical Determinants of Municipal Police Force Expenditure in 90 Non-Southern U.S. Cities*, 46(3) AM. SOCIOLOGICAL REV. 290, 293 (1981). It has regained popularity in the current political discourse as the type of policing supported by President Donald J. Trump and his administration. That style of policing has been described by him as "rough[ing] up" "thugs" while also expressing support for stop-and-frisk policing techniques. *See* Phillip Bump, *Trump's Speech Encouraging Police to be 'Rough,' Annotated*, WASH. POST (July 28, 2017), https://perma.cc/L34X-UG46; Maya Rodan, *President Trump Tells Police Officers Not To Be 'Too Nice' with Suspects*, TIME (July 28, 2017), https://perma.cc/HZ6K-2R9V; Louis Nelson, *Trump Calls for Nationwide 'Stop-and-Frisk' Policy*, POLITICO (Sept. 21, 2016), https://perma.cc/68S5-2USW; Aamer Madhani, *Trump Suggests Chicago Police Bring Back Controversial Stop-and-Frisk Searches*, USA TODAY (Oct. 8, 2018), https://perma.cc/LD3W-5H7H.

180. *See* OFFICE OF ATT'Y GEN., MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS AND UNITED STATES ATTORNEYS, SUBJECT: SUPPORTING FEDERAL, STATE, LOCAL AND TRIBAL LAW ENFORCEMENT 1-2 (2017), https://www.justice.gov/opa/press-release/file/954916/download.

181. *Id.* at 1.

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compliance with the previously stated edicts of the memorandum.[182] However, local policing has historically resulted in repeated constitutional violations in some municipalities when left unmonitored and unchecked.[183]

C. When Department of Justice Consent Decrees Implicate Collective Bargaining Terms

Legal scholars have identified collective bargaining provisions that can have the intended or unintended effect of circumventing accountability and effective discipline.[184] These contractual barriers exist in numerous departments across the nation and are essential to understanding the multi-faceted and complex nature of policing in America. As discussed in greater detail below, reform efforts by the Department of Justice have not been entirely focused on the terms of union contracts. This is for a number of reasons. Not all jurisdictions have state laws permitting collective bargaining by public employees.[185] And for those that do, not all agreements contain terms obviously detrimental to reform efforts. Moreover, the timing of union contract negotiations may also factor into the Department of Justice's decision to implore the local government to change its posture on certain contract terms. Accordingly, not all consent decrees contain provisions that identify ways to implement police reforms via changes to CBAs.

An analysis of twenty-six consent decrees,[186] related to law enforcement

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182. *Id.* at 2.

183. Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 135-50 (2016) (discussing drawbacks of U.S. decentralization that results in resource disparities and policing policies built on political preference not community desires because those who are marginalized have no political power). *See also* Walker, *supra* note 176, at 74-78.

184. *See, e.g.*, Catherine Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017) (exploring how labor law can impact organizational change in police unions); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012) (identifying collective bargaining agreements as deterrents to the prevention of unconstitutional police practices); Stephen Rushin, *Police Union Contracts*, 66 DUKE. L.J. 1191, 1206 (2017) (analyzing 178 police union contracts to illustrate how they impede accountability efforts); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2211 (2014) (arguing in part that collective bargaining agreement provisions related to disciplinary grievances impede the discipline of officers).

185. RICHARD C. KEARNEY & PATRICE M. MARESCHAL, LABOR RELATIONS IN THE PUBLIC SECTOR 64-66 (CRC Press, 5th ed. 2014).

186. The consent decrees are cited in footnotes 186-90. For these purposes, the analysis of consent decrees was limited to those instances where the federal government submitted Findings Letters to the local government and/or filed a complaint against a law enforcement agency with allegations of pattern or practices of unconstitutional policing in violation of the Violent Crime Control and Law Enforcement Act. The decrees were gathered through a review of databases maintained by the Department of Justice and the University of Michigan. The review looked at all cases between 1997 and 2018 where the federal and local governments entered into settlement agreements related to the charges alleged in the complaint. Instances where the government offered technical assistance and did not file a complaint were not included in the analysis. Statements of Interests filed by the Department of Justice have also not been included. Finally, the analysis excludes the terms of Settlement Agreement in *United*

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conduct pursuant to § 12601 (formerly § 14141), and negotiated between the Department of Justice and municipal police and sheriff's departments since 1997, serves to illustrate how each agreement is tailored to identify needed reforms and provide the necessary mechanisms. The earliest decree in this analysis was entered in February 1997 between the Department of Justice and the City of Pittsburgh.[187] It is important to note that the Department of Justice investigation of the Chicago Police Department in 2017 is not included in this analysis because the federal government abandoned its intervention efforts in that city.[188] There have been three settlement agreements negotiated and entered since 2017. There appears to be an effort on the part of the government to tailor each agreement to the needs of the locality in question. This narrowly-tailored approach presumably serves to meet the needs of each individual jurisdiction while ensuring that an overly centralized myopic approach to policing is not forced on cities with unique community and policing needs.

Three of the twenty-six decrees analyzed do not address the issue of unions and collective bargaining rights, as Arizona and North Carolina do not permit collective bargaining for officers and Missouri officers have limited bargaining rights.[189] Another nine of the twenty-six decrees expressly state that the terms of the agreement are not intended to alter, impact, infringe, or impair the current collective bargaining rights of officers.[190] The remaining fourteen settlement

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States v. Town of Colorado City due to the fact that the conduct at issue largely pertained to housing discrimination against individuals who were not members of the Fundamentalist Church of Jesus Christ of Latter-Day-Saints. The aggrieved individuals received monetary damages. *See* Complaint at ¶ 4, United States v. Town of Colorado City, No. 12-8123 (D. Az. June 21, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/07/18/coloradocity_complaint_6-21-12.pdf; Settlement Agreement at ¶ 2, United States v. Town of Colorado City, No. 12-8123 (D. Az. Apr. 18, 2016), https://perma.cc/46NG-6JL9; Verdict at 13-14, United States v. Town of Colorado City, No. 12-8123 (D. Az. Mar. 7, 2016).

187. Consent Decree, United States v. City of Pittsburgh, No. 97-0354 (W.D. Pa. Feb. 26, 1997), https://perma.cc/T4NW-YL4F.

188. Because the new Department of Justice administration did not seek a consent decree in Chicago, the Illinois Attorney General initiated an action alleging unconstitutional policing in the City of Chicago. Press Release, Illinois Attorney General (Aug. 29, 2017), https://perma.cc/K3CK-CGCQ. The Complaint filed alleged violations of § 1983, the U.S. Constitution, the Illinois Constitution, Illinois Civil Rights Act of 2003, and the Illinois Human Rights Act. *See* Consent Decree at ¶¶ 3-4, 707, Illinois v. City of Chicago, No. 17-cv-6260 (N.D. Ill. Sept. 13, 2018), https://perma.cc/6QMA-PA4X.

189. Settlement Agreement, United States v. Maricopa, No. 2:12-cv-00981 (D. Ariz. Jul. 17, 2015), https://perma.cc/UA7B-MBRY; Consent Decree, United States v. City of Ferguson, No. 4:16-cv-000180 (E.D. Mo. Apr. 19, 2016), https://perma.cc/RB3Z-SMWD; Settlement Agreement, United States v. Alamance County Sheriff Terry Johnson, No. 1:12-cv-1349 (M.D.N.C. 2016), https://perma.cc/QJ6F-AWW6.

190. *See* Consent Decree at ¶ 8, United States v. City of Los Angeles, No. 2:00-cv-11769-GAF-RC (C.D. Cal. Jun. 15, 2001), https://perma.cc/3LUE-KDX3; Consent Decree at ¶ 11, United States v. Territory of the Virgin Islands, No. 3:08-cv-00158-CVG-RM (D.V.I. Mar. 24, 2009), https://perma.cc/8ZC6-TXUV; Consent Decree United States v. City of Pittsburgh, *supra* note 187, at ¶ 7; Consent Decree Between the United States and Prince George's County at ¶ 8, No. 8:04-cv-00185 (D. Md. Jan. 22, 2004), https://perma.cc/A64A-

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agreements address the expectations and responsibilities of the parties concerning union challenges or collective bargaining negotiations related to the settlement terms.[191]

BEKM; Consent Decree at ¶ 6, United States v. City of Steubenville, No. 97-966 (S.D. Ohio, Aug. 28, 1997), https://perma.cc/5DZG-4HGD; Consent Judgment Use of Force and Arrest and Witness Detention at ¶ 9, United States v. City of Detroit, No. 03-72258 (E.D. Mich. Jun. 12, 2003), https://perma.cc/2VTS-QNPT; Settlement Agreement at ¶ 209, United States v. Los Angeles, No. 2:15-cv-03174 (C.D. Cal. Apr. 28, 2015), https://perma.cc/S8EF-X59V; AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE CITY OF MIAMI REGARDING THE CITY OF MIAMI POLICE DEPARTMENT at ¶ I.B.12, (Mar. 10, 2016), https://perma.cc/8TGU-29CY; Joint Application for Entry of Consent Decree at ¶ 128, United States v. New Jersey, No. 99-5970 (D.N.J. 1999), https://perma.cc/ZMN2-XJH2. It should be noted that the Miami Settlement Agreement also provides that if a conflict between the Agreement and the collective bargaining rights of officers arises, the city will devise a plan to avoid the decree. The Agreement further provides that the collective bargaining terms control but the parties will devise alternative "language to address the underlying goal" if the conflict cannot be avoided. AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE CITY OF MIAMI REGARDING THE CITY OF MIAMI POLICE DEPARTMENT at ¶ I.B.13 (Mar. 10, 2016), https://perma.cc/8TGU-29CY; Consent Decree at ¶¶ 497-98, 502, United States v. Police Department of Baltimore City, No. 1:17-cv-00099 (D. Md. Jan. 12, 2017), https://perma.cc/HL96-Y8YF; Settlement Agreement Between the City of Warren and the United States of America at 22, United States v. City of Warren, 4:12-cv-00086 (N.D. Ohio Jan. 26, 2012), https://perma.cc/U2T3-Y6ST.

191. *See* Agreement for the Sustainable Reform of the Puerto Rico Police Department at ¶¶ 297-98, United States v. Commonwealth of Puerto Rico, No. 3:12-cv-2039 (D.P.R. 2013), https://perma.cc/KC9K-2RHS; Consent Decree at ¶¶ 497-98, 502, United States v. Police Department of Baltimore City, No. 1:17-cv-00099 (D. Md. Jan. 12, 2017), https://perma.cc/HL96-Y8YF; Consent Decree Regarding the New Orleans Police Department at ¶¶ 9, 11, 488-89, United States v. City of New Orleans, 2:12-cv-01924 (E.D. La Jul. 24, 2012), https://perma.cc/2W3U-WDPV; Consent Decree at ¶ 100, United States v. City of Ville Platte, No. 6:07-cv-00769 (W.D. La. Jun. 11, 2007), https://perma.cc/JB2Y-TDKL; MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE CITY OF MISSOULA REGARDING THE MISSOULA POLICE DEPARTMENT'S RESPONSE TO SEXUAL ASSAULT at ¶ 65 (May 15, 2013), https://perma.cc/QM9J-QBEG; Resolution Agreement Among the University of Montana-Missoula, the United States Department of Justice, and the United States Department of Education at ¶ 57, No. 10126001 (2013), https://perma.cc/Q3CC-62ZJ; Settlement Agreement at ¶¶ 339-40, United States v. City of Albuquerque, No. 1:14-cv-1025 (D.N.M. Nov. 14, 2014), https://perma.cc/XA2K-CFQQ; Settlement Agreement, United States v. City of Cleveland at ¶¶ 152, 284, 399, No. 1:15-cv-01046-SO (N.D. Ohio May 26, 2015), https://perma.cc/P7QC-4CM3; Settlement Agreement between the United States Dept. of Justice and the Evangeline Parish Sheriff's Office at 17 (May 29, 2018), https://perma.cc/HF8J-NGE9; Settlement Agreement and Proposed Order at ¶¶ 226-27, 230-31, United States v. Town of East Haven at ¶¶ 231-32, No. 3:12-cv-01652-AWT (D. Conn. Nov. 20, 2012), https://perma.cc/3QL5-Z3XV; Settlement Agreement at ¶¶ 5, 154, 188-89, United States v. City of Portland, No. 3:12-cv-02265 (D. Or. Dec. 17, 2012), https://perma.cc/E62S-VW4J; Settlement Agreement and Stipulated Order of Resolution at ¶¶ 226-27, United States v. City of Seattle, No. 12-cv-1282 (W.D. Wash. Jul. 27, 2012), https://perma.cc/9WG2-DU5R; Settlement Agreement Between the City of Warren and the United States of America at 22, United States v. City of Warren, 4:12-cv-0008 (N.D. Ohio Jan. 26, 2012), https://perma.cc/U2T3-Y6ST; Consent Decree at ¶¶ 13, 219-20, 222, United States v. City of Newark, No. 2:16-cv-01731 (D.N.J 2016), https://perma.cc/LG5V-E93E.

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	SILENT	Not Intended to Alter or Impair	Only Notify if Challenged by Union[192]	If Subject of CB, Notify + Consult	Only Notify if Subject of CB	Best Efforts/ Work to Change CBA
Albuquerque				X		
Almanace Cty	X					
Baltimore						X
Cleveland						X
Detroit		X				
East Haven				X		
Evangeline			X			
Ferguson	X					
Los Angeles City		X[193]				
Los Angeles County		X				
Maricopa	X					
Miami		X				
Missoula				X		
New Jersey		X				
New Orleans				X		
Newark				X		
Pittsburgh		X				
Portland					X	
Prince George's County		X				
Puerto Rico				X		
Seattle					X	
Steubenville		X				
Univ. Montana				X		

192. This category specifically includes those Agreements where union challenges were specifically mentioned in the text. Settlement Agreement at ¶ 100, United States Department of Justice and the Evangeline Parish Sheriff's Office (May 29, 2018), https://perma.cc/GX9U-9GJD; Settlement Agreement Regarding The United States Department of Justice and the City of Ville Platte, Louisiana at ¶ 98 (May 31, 2018), https://perma.cc/DAL5-J2RC.

193. The consent decree, however, does contain a provision that requires the City of Los Angeles to renew a negotiation request with the bargaining units to have separate lawyers represent officers when more than one officer fires their weapon during the same officer-involved shooting incident. *See* Consent Decree, *supra* note 190, at ¶ 60, United States v. City of Los Angeles (C.D. Cal. Jun. 15, 2001), https://perma.cc/GS4S-KXG3.

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Ville Platte			X			
Virgin Islands		X				
Warren				X[194]		

The Settlement Agreement entered into between the federal government and the City of Miami is particularly worth noting. Paragraph 13 in Section I.B of the March 2016 agreement details that the collective bargaining agreement controls where any conflict between the settlement agreement and the associated collective bargaining agreement arises.[195] Only two decrees—Baltimore and Cleveland—contain language indicating a Department of Justice stance that the terms of the settlement agreement take precedence over conflicting collective bargaining agreements.[196] In fact, the Cleveland and Baltimore decrees contain provisions that depart from the collective bargaining agreements in place at the time the consent decrees were negotiated. The Baltimore decree uses "best efforts"[197] language and the Cleveland decree requires the city to "work with the unions."[198] There is no explicit mention of the drafters' legal conclusions or

194. It is important to note that the Baltimore and Warren consent decrees take two positions: 1) that the agreements are not intended to alter the existing collective bargaining agreements, and 2) that the the respective cities and police departments bear the responsibility of notifiying, and consulting with, the Department of Justice of any consent decree terms that become the subject of collective bargaining negotiations. *See* Consent Decree at ¶¶ 497-98, United States v. Police Department of Baltimore, No. 1:17-cv-00099 (D. Md. 2017), https://perma.cc/HL96-Y8YF; Settlement Agreement Between the City of Warren and the United States of America, United States v. City of Warren at ¶¶ I.B.9, VII.D.5, 4:12-cv-0008 (N.D. Ohio Jan. 26, 2012), https://perma.cc/4KAG-YLHV. There are several provisions throughout the Warren decree that demonstrate support for the existing terms of collective bargaining agreements and the use of those terms as the foundational premise for several reform efforts. Settlement Agreement Between the City of Warren and the United States of America at ¶¶ III.5, IV.C.6, V.A.6, V.C.2, VII.A.3, United States v. City of Warren, 4:12-cv-0008 (N.D. Ohio Jan. 26, 2012), https://perma.cc/4KAG-YLHV.

195. Agreement Between the United States Department of Justice and the City of Miami Regarding the City of Miami Police Department at ¶ I.B.13 (Mar. 10, 2016), https://perma.cc/ERS8-AD2Z.

196. *See* Consent Decree at ¶ 498, United States v. Police Department of Baltimore, No. 1:17-cv-00099-JKB (D. Md. 2017), https://perma.cc/HL96-Y8YF; Settlement Agreement at ¶ 399, United States v. City of Cleveland, No. 1:15-cv-01046-SO (N.D. Ohio May 26, 2015), https://perma.cc/QU38-CDQP. For the most part it is unclear how the terms related to collective bargaining vary so much from one decree to the next. This Author has been told off the record that it depends upon the timing of negotiations and the extent to which the respective union contract has contributed to the lack of accountability and oversight essential to the continued practice/provision of constitutional policing.

197. *See* Consent Decree at ¶ 498, United States v. Police Department of Baltimore City, No. 1:17-cv-00099 (D. Md. Jan. 12, 2017), https://perma.cc/HL96-Y8YF ("To the extent any . . . collective bargaining provision conflicts with any provision of this Agreement or impedes its effective implementation, the City and BPD will use its best efforts to advocate to change the . . . collective bargaining provision(s).").

198. *See* Settlement Agreement at ¶¶ 202, 249, 314, United States v. City of Cleveland, No. 1:15-cv-01046-SO (N.D. Ohio May 26, 2015), https://perma.cc/QU38-CDQP.

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indication whether they intended for the terms of the federally-mandated consent decree to supersede the collective bargaining agreement provisions.

The majority of consent decrees disavow any infringement on existing collective bargaining agreements. That has not assuaged the concerns of police unions and, in at least one instance, of police department leadership. Chief Jerry McCartney, Steubenville Chief of Police, documented his disapproval of the decree in that city.[199] His office issued a press release explicitly stating his belief that the police department must be involved in negotiating the accountability reforms in that city.[200] Chief McCartney also expressed disdain that the decree required his successor to be hired from outside of the Steubenville Police Department.[201] He also criticized the new requirement that Internal Affairs investigate anonymous complaints under the decree.[202] The reaction of department leadership in Steubenville highlights that the issues often raised or informally complained about by police regarding reforms can have little or nothing to do with collective bargaining rights.

III. THE RISE OF POLICE UNIONS AND THEIR RESPONSE TO CURRENT REFORM EFFORTS

Federal intervention into local policing practices typically garners the interest of the local union, which manifests as intervention in the structural reform litigation process. That intervention has occurred through formal motions to intervene and by filing arbitration grievances regarding certain reform provisions. This section discusses the origins of collective bargaining rights for police officers and the general principles conferred to public employees in the right to bargain with the aim of providing a backdrop for the relevant issues that illustrate the impropriety of union intervention in constitutional reform efforts.

A. Historical Purpose and Contribution

Law enforcement collective bargaining rights are of great value to officers in jurisdictions providing statutory authority for organizing. Those rights generally provide officers the ability to appoint representatives charged with negotiating salary, benefits, and disciplinary due process requirements on behalf of the entire membership. This current posture is starkly different from the wage-and-work conditions experienced by officers during the first half of the twentieth century. Historians have recognized the oppressive and grueling work conditions of officers in 1919 as the initial force that eventually led to current public safety

199. *See* Steubenville Department of Police News Release 2-3 (October 27, 1999). https://perma.cc/9EH7-QZLB.

200. *Id.* at 3.

201. *Id.* at 2.

202. *Id.* at 3.

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personnel organizing.[203] The officers in Boston were not immune to the economic hardship that befell our nation and had been forced to work for a less than livable wage for more than seventy hours each week.[204] Their demand for better earnings and fewer hours were ignored by the police department and local government. Eventually, several of the officers organized a strike and massive riots wrecked the city each night for three days.[205] Calvin Coolidge, then governor of Massachusetts, dispatched the State Guard to restore order.[206]

Opposition to public employees organizing was historically rooted in the belief that the government—as a sovereign body—could not be made to negotiate with its subjects.[207] Local leaders enacted prohibitions specifically barring individuals employed as police officers, firefighters—and, in some jurisdictions, teachers—from striking and joining certain labor organizations; Congress passed a law specifically prohibiting strikes and unionization by Washington, D.C. police.[208] Federal employees were generally granted the right to organize with the passage of the Lloyd-La Follette Act of 1912.[209] But the right to organize and bargain remained elusive for law enforcement personnel.

Legal and policing scholars have explored the rise and power of police unions in American cities.[210] Law enforcement ranks first attempted to organize during the late 1800s "to provide pension and insurance programs and to fulfill the social needs of their members."[211] While those efforts eventually proved fruitful for officers in Boston, it was not without a heavy cost to the early collective bargaining efforts by sworn officers.[212] Though many private and public sector employees had successfully lobbied for the right to organize,[213] the Boston strike caused many local governments to pass legislation specifically forbidding police and firefighters from organizing.[214]

The tumultuous relations between African Americans and police officers in

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203. STERLING D. SPERO, GOVERNMENT AS EMPLOYER 250 (1948).

204. JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962, at 25 (2004).

205. *Id.* at 26-27.

206. *Id.* at 13-14.

207. RICHARD C. KEARNEY & PATRICE M. MARESCHAL, LABOR RELATIONS IN THE PUBLIC SECTOR 16-17 (CRC Press, 5th ed. 2014).

208. SLATER, *supra* note 204, at 23-24.

209. *Id.* at 19.

210. *See id.* at 15-38. *See generally* Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, *in* POLICE REFORM FROM THE BOTTOM UP: OFFICERS AND THEIR UNIONS AS AGENTS OF CHANGE 88 (Monique Marks & David Sklansky eds., 2012); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 199-200 (2d ed. 1998); Stephen Rushin, *Police Union Contracts*, 66 DUKE. L.J. 1191, 1234-35 (2017).

211. KEARNEY & MARESCHAL, *supra* note 207, at 15.

212. Walker, *supra* note 210, at 150.

213. SLATER, *supra* note 204, at 16 (discussing history of postal employee and private sector employee unions prior to start of police unions).

214. *Id.* at 35-36.

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major cities during the mid-to-late 1960s provided a new opportunity for officers to organize and to leverage their power while seeking better wages and fair treatment. In Watts, California, witness accounts of a traffic stop between a black citizen and a white officer inflamed a community that had reportedly become too familiar with officers harassing black community members.[215] The revolt that followed lasted six days.[216] Similar revolts also took place in Detroit,[217] Newark,[218] and Cleveland[219] following what community members and witnesses described as a history of police harassment and brutality.

Leaders within the police rank-and-file had spent considerable time garnering the political support of city leaders despite the fact that they were not legally able to negotiate CBAs between their unions and their respective municipalities.[220] Ongoing racial tensions and demands for civil rights from African Americans changed all of this.[221] The 1960s saw the enactment of state statutes giving public employees, including police officers, the right to collectively bargain employment contracts with government employers.[222] The statutes provided unions with an opportunity to curtail the rise of demands for civilian oversight while defining the process by which officers could be disciplined for misconduct.[223] After being regarded with contempt following the Boston strike that sought to secure affordable wages and better work conditions, police unions re-emerged with increased political strength.[224] Now, they were largely accepted.[225] This newfound acceptance coincided with community demands for human and civil rights.[226] The number of union members has grown dramatically since the 1960s, when there were fewer than 90,000 members.[227]

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215. *Watts Riots*, CIVIL RIGHTS DIG. LIBRARY, https://perma.cc/ZZ6F-2XXV (archived Jan. 16, 2019); *Watts Riot Begins*, HISTORY.COM, https://perma.cc/VF8E-TJU7 (archived Jan. 16, 2019).

216. *Watts Riots*, *supra* note 215.

217. *Detroit Riots Begin*, HISTORY.COM, https://perma.cc/6RJM-9KWJ (archived Jan. 17, 2019).

218. *See* Nancy Solomon, *40 Years On, Newark Re-Examines Painful Riot Past*, NPR (July 14, 2007), https://perma.cc/SDS6-CD8Y.

219. *See Hough,* CLEVELAND HISTORICAL, https://perma.cc/2HS3-8A59 (archived Jan. 16, 2019); *Glenville Shootout*, OHIO HISTORY CENT., https://perma.cc/GC5M-34AJ (archived Jan. 16, 2019).

220. Walker, *supra* note 210, at 199-200; Catherine Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 736 (2017).

221. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 BOS. U. PUB. INTEREST L.J. 185, 196 (2005).

222. Fisk & Richardson, *supra* note 220, at 736, 740-41.

223. *Id.* at 736-37

224. *Id.*

225. *Id.*

226. *Id.*; Walker, *supra* note 210, at 199; Rushin, *supra* note 210, at 1234-35.

227. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 1701, OCCUPATIONAL MANPOWER AND TRAINING NEEDS: INFORMATION FOR PLANNING TRAINING

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Unions now represent over 500,000 officers in 2018.[228]

B. How Collective Bargaining Is Used to Undermine Police Reform

Union membership has afforded officers, as public sector employees, important employment protections. While there is no federal statute conferring collective bargaining rights to government employees at the municipal and state levels,[229] approximately thirty-three states provide some form of collective bargaining rights to law enforcement personnel.[230] General principles from the National Labor Relations Act (NLRA) inform public employees' state statutory rights.[231] Those principles include the rights to organize, to form and participate in labor organizations, to choose their own representatives through whom to bargain collectively, and to choose not to engage in organizing efforts.[232] What the right to bargain collectively means for any one group varies by state. It is most commonly understood that the right provides unions the power to negotiate regarding "wages, hours, and other terms and conditions of employment."[233]

Securing and protecting this right is understandably of great importance to officers considering the arduous and oppressive work conditions endured by those in law enforcement during the early 1900s.[234] Contemporary societal norms and laws recognize the need for employees to work a reasonable number of hours per week while earning fair compensation for that work. As a result, in most jurisdictions public- and private-sector union employees have the right to negotiate terms and conditions of employment.[235]

Union leaders believe they are charged with protecting the interests of their members.[236] They often do so with a singular focus on how to create work conditions reflective of the role police officers play in society and supportive of the often stressful and dangerous conditions under which they work. The rise of unions against the backdrop of community demands for non-discriminatory and humane policing during the civil rights era unfortunately resulted in the

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PROGRAMS IN THE 1970'S, at 18 (1971).

228. *See About the Fraternal Order of Police,* FRATERNAL ORDER OF POLICE, https://perma.cc/9ABE-P9Y5 (archived Jan. 17, 2019) (estimating "more than 330,000 members"); NATI'L ASS'N OF POLICE ORGS., https://perma.cc/5M5J-JSHW (archived Jan. 16, 2019) (estimating "more than 241,000 sworn law enforcement officers" in their organization).

229. The federal statute that confers collective bargaining rights, 29 U.S.C. § 157 (2017), excludes "any State or political subdivision thereof" from its definition of "employer." 29 U.S.C. § 152(2).

230. KEARNEY & MARESCHAL, *supra* note 207, at 65-66.

231. *Id.* at 75.

232. *Id.*

233. *Id.* at 77. This scope is derived from the NLRA which, as discussed above, serves as a model for the most customary state law bargaining rights. *Id.* at 75, 77.

234. *See* SLATER, *supra* note 204, at 14-15.

235. KEARNEY & MARESCHAL, *supra* note 207, at 30-33.

236. *See* Fisk & Richardson, *supra* note 220, at 715.

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continuation of diametrically opposed interests between the government employers and their employee groups.[237] This is demonstrated by continued efforts by law enforcement organizations to prevent community involvement in accountability practices, such as civilian oversight.

Many collective bargaining agreements contain provisions describing the processes by which alleged officer misconduct may be disciplined if those allegations proved to be well-founded.[238] These agreements typically contain terms that require the department to charge an officer with alleged wrongdoing during a specified period of time or risk the ability to exact discipline for the infraction, while also containing provisions that hinder effective investigations.[239]

It is undeniable that all individuals and systems benefit from fair and reasonable due process. Law enforcement personnel are no different and should be afforded the timely, fair, and impartial process that employees with bargaining rights generally expect. There is an inherent tension between the creation of a disciplinary structure that provides due process to officers without compromising the government employer's right to identify and reduce the number of individuals not suited to serve the public in a law enforcement capacity. Including terms in union contracts that limit the employer's ability to monitor and manage the misconduct of officers goes far beyond merely ensuring that disciplinary processes are fair, timely, and impartial. Indeed, such provisions make it increasingly difficult for police departments to track misconduct and reduce the number of officers unable or unwilling to meet the demands of their employment.

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237. *See* Paul S. Bryant, *Hybrid Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act*, 41 VAND. L. REV. 601, 603 (1988) (discussing how the diametric opposition of employer and employee interests was one of the underlying assumptions that led to the passage of the Wagner Act, the precursor of the NLRA, in 1935); Anne Marie Lofaso, *Workers' Rights as Natural Human Rights*, 71 U. MIAMI L. REV. 565, 636-37 (2017) (discussing the inherent conflict between the interests of employers and employees); WALKER, *supra* note 210, at 199 (discussing the re-birth of police unions in opposition to community demands for civilian oversight).

238. *See Police Contracts Database*, POLICE UNION CONTRACT PROJECT, http://perma.cc/5LQT-LFZJ (archived Jan. 16, 2019).

239. Rushin, *supra* note 210, at 1198; Agreement Between the Fraternal Order of Police Chicago Lodge No. 7 and the City of Chicago, Effective Jul. 1, 2012 through June 30, 2017 at ¶ 6.1.D; Collective Bargaining Agreement between the City of Cleveland and Cleveland Police Patrolmen's Association (C.P.P.A) Non-Civilian Personnel, Effective Apr. 1, 2013-Mar. 31, 2016 at ¶ 12(l); Master Agreement Between the City of Detroit and the Detroit Police Officers Association, 2014-2019 at § 9 ¶¶ C, E; Memorandum of Understanding Between the Baltimore City Police Department and the Baltimore City Lodge No.3, Fraternal Order of Police, Inc. Unit I: Police Officers, Police Agents, and Flight Officers, Fiscal Years 2014-2016 at Art. 16 ¶ A(3)(c); MD Code, Public Safety, § 3-104(c)(1)-(2); Memorandum of Understanding No. 24 for Joint Submission to The City Council Regarding Police Officers, Lieutenant and Below Representation Unit by and between the City of Los Angeles and the Los Angeles Police Protective League at Art. 8.2.B.1 (Jul. 1, 2011) (cross-references Los Angeles Charter and Administrative Code § 1070 (c), which has time limits for disciplinary action).

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As a result, law enforcement agencies continue to employ officers involved in repeated incidents of alleged or confirmed misconduct.[240] This issue is connected to another common provision that can be found in collective bargaining agreements: the requirement that allegations of misconduct and related disciplinary actions be removed from the personnel files of officers in as little as six months and up to six years.[241] The removal of documented instances of officer misconduct prevents such information from being considered in subsequent disciplinary proceedings.[242] It wipes the subject officer's record clean for the purposes of promotion eligibility. Union contracts that limit the government employer's ability to manage its employees serve only to exacerbate difficulties with modern reform efforts.

The contract between the City of Cleveland and the Cleveland Patrolmen's Association in effect at the time of the Department of Justice's investigation and subsequent settlement with the City of Cleveland contained a provision that required civilian complainants to file complaints alleging police misconduct in their own handwriting and to do so under their own signature.[243] The settlement agreement between the U.S. Department of Justice and the City of Cleveland in 2015 provided that the City would work with the unions to revise this portion of their union contract. The settlement agreement called for civilian complaints to be taken in a variety of ways—electronically, telephonically, and in person—and also allowed for third party and anonymous complaints to be received against officers.[244]

The Cleveland consent decree also required the city to negotiate with the unions on the issue of police disciplinary record retention. The decree called for the city to maintain police disciplinary records in officer files for ten years.[245] The union contract in place at the time of the settlement agreement broke discipline down into two categories and allowed for a much shorter retention time: verbal warnings and written reprimands could only be kept in the file for six months, and documentation of other disciplinary actions meted against officers for misconduct could only be kept in the file for two years after the

240. *See* CITIZENS POLICE DATA PROJECT, https://cpdp.co/ (last visited June 8, 2019) (live database of complaints and outcomes for officers employed by the Chicago Police Department); P.R. Lockhart, *Officer Who Shot Antwon Rose Is Accused of Past Civil Rights Violations*, VOX (July 5, 2018), https://perma.cc/BPX3-KW28; Kenneth Moton & Morgan Winsor, *'No Justification' for Officer Charged with Homicide in Killing of Unarmed Teen, Prosecutor Says*, ABC NEWS (June 27, 2018), https://perma.cc/4XZF-7R5V.

241. Rushin, *supra* note 210, at 1228-30.

242. *Id.* at 1195-96.

243. Collective Bargaining Agreement between the City of Cleveland and Cleveland Police Patrolmen's Association (C.P.P.A.) Non-Civilian Personnel, *supra* note 239, at ¶ 12(m); Settlement Agreement at ¶ 202, United States v. City of Cleveland (N.D. Ohio 2015) (agreeing "to allow civilian complaints to be submitted . . . verbally or in writing" or in other ways "and with or without a signature from complainant").

244. Settlement Agreement, U.S. v. City of Cleveland, *supra* note 242.

245. *Id.* at ¶ 249.

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imposition of discipline.[246] The contract negotiated in early 2018 falls far short of the ten-year retention requirement of the consent decree. Instead, the union contract prohibits discipline records from being used for "progressive discipline purposes" for a specified time period depending upon the category of discipline; one year for verbal warnings and written reprimands and three years for disciplinary suspensions.[247]

Interestingly enough, the new contract no longer addresses the length of time records can be retained in an officer's personnel file but does impose a three-year time limit on past issues being considered in new disciplinary matters.[248] However, merely tracking and increasing the length of time records are kept fails to effectively increase police accountability. In order for police departments to have effective accountability mechanisms, the records need to not only be retained, but also be of use to supervisors and investigators when subsequent instances of misconduct occur. Limiting the timeframe by which the Division can use prior misconduct when deciding what discipline should be imposed for repeated, future misconduct circumvents the accountability reforms required under the consent decree.

The consent decree in Cleveland drew fiery dissent from the head of the Cleveland Police Patrolmen's Association. Detective Steve Loomis, the union President at the time, made unsubstantiated proclamations that the reforms would lead to the death of police officers and threatened to fight certain terms of the decree that contradicted the union contract.[249]

The response by a local union to the settlement agreement between the Department of Justice and the City of Portland further illustrates the issue. The December 2012 agreement centered around the Portland Police Bureau's

246. Collective Bargaining Agreement between the City of Cleveland and Cleveland Police Patrolmen's Association (C.P.P.A.) Non-Civilian Personnel, *supra* note 239, at ¶ 10.

247. *Id.*

248. *Id.*; Nick Castele, *Cleveland Police Union Contract Approved by City Council*, IDEASTREAM (May 14, 2018), https://perma.cc/MEX9-T4BL.

249. Evan MacDonald, *Cleveland Police Union Says Justice Department Reforms Would Endanger Police*, CLEVELAND.COM (May 28, 2015), https://perma.cc/V9VV-JPRY. In addition to the new use of force requirements, Mr. Loomis voiced great dissatisfaction with a new requirement that everyday civilians be allowed to file anonymous complaints. *Id.* The contract between that city and the Cleveland Police Patrolmen's Association union in effect at the time of the Department of Justice's investigation and settlement agreement with the city contained a provision requiring signatures civilian complainants alleging police misconduct. Cleveland Police Patrolmen's Association Contract, *supra* note 239, at ¶ 12(m). The complaints had to be in their own handwriting and their own signature. *Id.* The only exception identified was for illiterate complainants. *Id.* In that instance, the union contract required that the complainant's statement be audio recorded. *Id.* The settlement agreement between the U.S. Department of Justice and the City of Cleveland in 2015 provided that the City would work with the unions to revise this portion of their union contract; it called for civilian complaints to be taken in a variety of ways—electronically, telephonically, and in person—and also allowed for third party and anonymous complaints to be received against officers. *See* Settlement Agreement, U.S. v. City of Cleveland, *supra* note 243.

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treatment of persons suffering from apparent mental health crises.[250] Nearly two years passed before the department began to implement of use-of-force reforms because the federal judge overseeing the reform process partially granted the union's motion to intervene.[251] Kelly Swoboda and Nicholas Davis, two individuals in the midst of separate mental health crises, were killed by Portland police in the interim.[252] The purported purpose of the intervention was to afford the union an opportunity to protect its interests and ensure that no conflicts between the consent decree and the collective bargaining agreement existed at the time the decree was approved by the court.[253]

At the time of consent decree negotiations, the Portland Police Association raised concerns regarding certain provisions of the decree. Concerns about when officers would be interviewed following uses of force and the process by which investigations of alleged officer misconduct would be handled were included in the union's litany of objections to the terms of the settlement agreement.[254] The consent decree required officers involved in uses of lethal force and in-custody deaths to be interviewed and to participate in an on-scene walk-through with investigators.[255] The decree also required a more streamlined investigation process for alleged non-criminal officer misconduct.[256] That process empowered the Independent Police Review Division to conduct independent reviews and investigations where warranted.[257] The intention was to replace a dual-track process that allowed the Bureau-controlled Professional Standards Division to conduct administrative investigations in addition to those conducted by the Independent Police Review Division.[258]

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250. Settlement Agreement Pursuant to Fed. R. Civ. P. 41(a)(2) at 3, United States v. City of Portland, No. 3:12-cv-02265, (D. Or. Dec. 17, 2012).

251. *See* Aimee Green, *'Groundbreaking' Settlement on Portland Police Use of Excessive Force Draws Praise, Disappointment*, OREGONIAN (Aug. 29, 2014), http://perma.cc/YH67-TCFY (reporting that the judge signed off on decree requiring annual progress reports on police reform for up to five years, ending two years of "turmoil and uncertainty" after the Department of Justice investigation occurred); United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 WL 12309780, at *3, 10 (D. Or. Feb. 19, 2013).

252. Green, *supra* note 251.

253. United States v. City of Portland, 2013 WL 12309780, at *3-5. The City of Portland and the United States' concession that some of the terms of the consent decree conflicted with unspecified terms of the existing collective bargaining agreement supported the court's finding that the Union had a protectable interest. Unfortunately, the finding failed to identify the nature of the terms at issue. A more focused analysis of the provisions at issue could have led the court to recognize that that the relevant provisions were within the sole purview of city management and, therefore, not appropriate for bargaining.

254. Memorandum in Support of Intervener-Defendant Portland Police Association's FRCP 24 Motion to Intervene 19, United States v. City of Portland, No. 3:12-cv-02265, 2012 WL 9385214 (D. Or. Feb. 19, 2013).

255. Settlement Agreement Pursuant to Fed. R. Civ. P. 41(a)(2), at 45 (¶ 127), No. 3:12-cv-02265, 2012 WL 9385214 (D. Or. Feb. 19, 2013).

256. *Id.* at 45 (¶ 128).

257. *Id.*

258. *Id.*

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The union argued that these provisions were in conflict with their collective bargaining rights and, despite entering into an agreement to move forward with the consent decree, reserved the right to grieve the implementation.[259] The resulting contract between the union and the City of Portland failed to address whether officers are now required to participate in on-site walk-throughs during investigations following a use of force.[260] Additionally, the terms of the agreement with the union call into question the autonomy and effectiveness of the Independent Police Review (IPR) process.[261]

In Baltimore, reform efforts sought—among other things—to broaden civilian engagement with the disciplinary process.[262] The consent decree in Baltimore calls for two civilian members to serve and vote in each disciplinary hearing conducted by the Baltimore Police Department.[263] This conflicts with the current union contract that specifically states that, with the exception of an Administrative Law Judge who can serve as a hearing officer, no civilians may serve on the disciplinary boards charged with adjudicating non-criminal misconduct allegations against officers.[264] Recent negotiations between officers and Baltimore resulted in a short-term contract that included a pay increase for officers but did not address the issue of adding community members to disciplinary hearings.[265] Despite the fact that the media reported that the local mayor considers the requirement that civilians be included on disciplinary hearing boards to be "non-negotiable," the issue was not addressed in the most recent contract.[266]

The existence of public sector collective bargaining rights does not diminish state obligations to manage and direct safety forces. Indeed, the state maintains an affirmative duty to properly train, supervise, and manage its police forces. And while the police union leadership supports and advocates for the interests of

259. Fact Sheet for the Memorandum of Agreement (MOA) between the City, PPA, and USDepartment of Justice, CITY OF PORTLAND OREGON, https://perma.cc/G9P4-UJBJ (archived Jan. 16, 2019).

260. Labor Agreement between the Portland Police Association and the City of Portland July 1, 2013-June 30, 2017 at ¶¶ 61.2.1, 61.2.2, https://perma.cc/4R42-ARHR (archived Jan. 16, 2019).

261. The referenced contract provides the entity known as the Independent Police Review with no "authority or responsibility relating to the imposition of discipline" and officers have specifically retained the right to challenge subpoenas issued by the IPR. *Id.* at ¶¶ 62.1, 62.6.

262. Consent Decree at ¶¶ 2, 380, United States v. Police Department of the City of Baltimore, No. 1:17-cv-00099 (D. Md. Jan. 12, 2017), https://perma.cc/J8ZJ-AUGH.

263. *Id.* at ¶ 380.

264. *See* Memorandum of Understanding between the Baltimore Police Department and the Baltimore Fraternal Order of Police, Fiscal Year 2010, at 19, https://perma.cc/24G2-ZXA4.

265. *Id.*; Ian Duncan & Kevin Rector, *Baltimore Police Union, City Agree to Short-Term Contract with 3 Percent Raise, $500 Bonus*, BALTIMORE SUN (Apr. 6, 2018), https://perma.cc/7TD8-74X9.

266. *Id.*

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its members, the local government is obligated to protect the rights and interests of their constituents. It is a managerial function of government to set the policies and procedures of their police departments. As mentioned above, the bargainability of a certain subject matter is determined by whether that subject or issue is considered to involve the compensation or contemplated work conditions of union employees.

The CBAs between local governments and their police forces contain terms directly related to the manner in which officers can or cannot be held accountable for their conduct. In many instances they restrict the manner in which civilian complaints can be filed against officers.[267] Additional obstacles to accountability can be found in CBAs that limit the amount of time that information pertaining to officer discipline can be included in that officer's personnel file for the purposes of promotion considerations.[268] Some agreements also permit member officers the unique ability to review evidence pertaining to internal investigations prior to being interviewed.[269]

The manner in which complaints are filed or the length of time discipline can be used to consider an officer's suitability for promotion should not be assumed to infringe on due process. Reforms in this area are not designed in any way to impede or alter the administrative hearings designed to determine whether discipline is appropriate for alleged misconduct. Indeed, an officer's right to be fairly considered for a promotion should not take precedent over the managerial duty and obligation of a city to ensure that the lives of its citizens are not unduly harmed by officers who, whether willfully or negligently, fail to employ training and tactics that comport with constitutional policing.

It is, however, the oft-perceived vagueness of the clause "other terms and conditions of employment" that is repeatedly the subject of court filings in both the bargaining and structural reform litigation context. Justice Stewart's widely-cited concurrence in *Fibreboard Paper Products Corp. v. N.L.R.B.* acknowledged that "conditions of employment" can be interpreted in many different ways in the bargaining context.[270] That opinion, though it involves the private sector, briefly traces the legislative history of the National Labor Relations Act and asserts that Congress aimed to limit the scope and class of topics about which employers and employees are compelled to bargain.[271] As Stewart wrote, "It is important to note that the words of the statute are words of limitation . . . [it] *does not say* that the employer and employees are bound to confer upon *any subject which interests* either of them."[272] His concurrence also

267. *See* Rushin, *supra* note 210, at 1220.

268. *Id.*

269. *Id.*

270. Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 221 (1964) (Stewart, J concurring).

271. *Id.* at 220-21.

272. *Id.* at 220 (emphasis added).

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pointed to the prevailing opinions of at least seven U.S. judicial circuits that found management decisions made by employers not to be a condition of employment subject to the bargaining process.[273] Instead, the opinion argues that in addition to the practical "physical dimensions" of the job such as the hours and type of work, the meaning of the phrase "other terms and conditions of employment" must also include the right to bargain over whether or not the job will continue to exist.[274] Undercutting the right to bargain over wages and hours by replacing one set of workers for less expensive subcontractors or circumventing seniority and discrimination rights is not permissible under collective bargaining.[275]

Issues pertaining to "entrepreneurial control" in the private-sector—as seen in *Fibreboard*—are analogous to "management rights" in the public sector. Public policy concerns have rightfully influenced the determination of management rights. This is because governmental decisions that affect the public in a significant way should be made by democratically elected officials. As discussed more fully in Subpart III.2.b, rules related to police use-of-deadly-force are a classic example of the need for management to be the decision-maker for police policies and issues that will significantly impact the public.

Several state courts have evaluated the "other terms and conditions of employment" issue in the public sector. State court decisions generally speak squarely to the issue of what is and is not a bargainable right for law enforcement in their respective jurisdictions. The managerial prerogative exception issues subject to bargaining are widely accepted by state courts.[276] This exception removes policy matters—those issues that are of importance and concern to the general public—from the scope of bargainable issues. Some states have passed laws detailing the types of issues that fall under the categories of bargainable issues and managerial prerogative.

A city charter provision in Denver led the Colorado Supreme Court to rule directly on the issue of a new disciplinary matrix for Denver firefighters.[277] The bargaining unit representing firefighters attempted to bargain the provisions of the new matrix with city officials.[278] Both the trial court and the court of appeals found in favor of the union and enjoined the government-employer from unilaterally revising the matrix. In doing so, the disciplinary matrix was deemed to be a "term and condition of employment" and, consequently, subject to collective bargaining.[279]

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273. *Id.* at 221-22.

274. *Id.* at 222.

275. *Id.* at 222-25.

276. Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242, at II § 3[a] (2018).

277. City of Denver v. Denver Firefighters Local No. 858, 320 P.3d 354, 355 (Colo. 2014).

278. *Id.* at 356.

279. *Id.*

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The Colorado Supreme Court conducted a de novo review of the contract issue on appeal.[280] It reviewed the city charter and made two findings: 1) the charter grants the city power to draft and implement discipline policies; and 2) the charter provisions regarding the firefighters' collective bargaining rights does not list discipline as a negotiable term.[281] Looking at the collective bargaining contract as an "auxiliary source" in its analysis, the court found that statutory interpretation required giving plain meaning to the terms and strictly construing the language.[282] The court disavowed contrary arguments that would lead them to "absurd or unreasonable results."[283] The court went on to hold that: 1) the city could unilaterally both draft and implement disciplinary rules; and 2) the collective bargaining rights of firefighters do not limit governmental "rights or functions of management."[284]

The court in *Patrolmen's Benevolent Ass'n v. New York State Public Employment Relations Board* relied on both local law and public policy to find that discipline policies are precluded from bargaining by police unions.[285] This is true despite the strong presumption that requires all terms and conditions of employment to be subject to bargaining under New York's civil service legislation, the Taylor Law.[286] The court found that where the New York City charter gave the Police Commissioner sole authority over police discipline and public policy renders the subject non-negotiable, the matter must be precluded from contract negotiations.[287] The quasi-military nature of the police force was noted by the court as one justification for government officials to have command over discipline matters.[288] The court also cited public policy reasons for limiting collective bargaining rights, namely the sensitive nature of police work requiring balancing the need for discipline and officer morale, as well as adhering to the management authority delegated by local municipal laws.[289]

Managerial policy exception also precluded unions from using the bargaining process to add a just cause standard to discipline determinations in New Hampshire. The New Hampshire Supreme Court reversed a Public Employee Labor Relations Board (PELRB) determination that sought to force the city to bargain over the issue.[290] The PELRB had found that the managerial policy exception did not preclude city officials from negotiations.[291] The court

280. *Id.* at 357.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 360.
285. 848 N.E.2d 448, 449, 451-53 (N.Y. 2006).
286. *Id.* at 450-51.
287. *Id.* at 452-54
288. *Id.* at 453-54.
289. *Id.*
290. *In re* City of Concord, 651 A.2d 944, 945 (N.H. 1994).
291. *Id.* at 946.

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disagreed and relied on the limited scope of public-employee bargaining rights in doing so.[292] The scope is limited in order to avoid allowing the bargaining process to establish "power public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage."[293] Managerial exception is identified as a mechanism by which to achieve this goal.[294]A subject matter can be both a term of employment and a managerial responsibility. Whether or not the subject matter interferes with public control is the defining factor.[295] The court found that the PELRB failed to appropriately apply the managerial policy exception and that the city was not obligated to negotiate on the inclusion of a just cause standard to the discipline policy.[296]

This analysis provides some guidance and a framework for evaluating the rights and interests of police unions in the structural reform litigation context. The assertion that a union has a generic Rule 24 interest in the matter should not be sufficient, as the stakes in police misconduct cases are too high. Federal Rule of Civil Procedure 24 provides a mechanism by which a non-party to a lawsuit can seek to intervene and become a party to the action.[297] As discussed more fully in the following section, decisions by courts on these motions often hinge on the purported interest of the movant in the litigation. Instead, decisions on police union motions to intervene in structural reform litigation should be informed by whether the asserted interests fall under either the managerial prerogative or bargainable category. Doing so will permit local governments to maintain their authority and responsibility over police powers and ensure that they implement the long-awaited remedial measures aimed at establishing required constitutional policing. As discussed below, an extremely liberal analysis of Rule 24 motions to intervene by courts often ignores the nature of the litigation. Such an approach can contribute to unjust delays and unmerited interference in the reform process. The section concludes with an examination of arbitration grievances and how they have at times been used by unions to obstruct reform efforts.

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292. *Id.* at 947.

293. *Id.* at 946 (citations omitted).

294. *Id.* at 946.

295. *Id.* at 948. The managerial exception in New Hampshire is analyzed under a three-part inquiry: 1) has the subject matter been reserved to "exclusive managerial authority" by constitution or statute?; 2) does the subject primarily affect terms and conditions of employment and not a broad managerial policy?; and 3) does the subject proposal "interfere with public control of government functions"? *Id.*

296. *Id.*

297. Section (a) of the rule governs movants who claim they have a right to intervene and it is technically referred to as an "intervention of right." Section (b) of the same rule governs instances where the court evaluates motions seeking permissive intervention. FED. R. CIV. P. 24(a)-(b). The scope of this Article focuses on the right of intervention under Section (a).

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1. Motions to Intervene – A Deeper Analysis Is Needed in Structural Reform Litigation

Police unions in jurisdictions with collective bargaining rights or civil service protections have moved to intervene in federal cases involving structural reforms of those departments. Those motions typically argue that the moving union has a right under Federal Rule 24(a) to intervene in the action.[298] Motions to intervene as of right have been interpreted by federal courts using a similar four-part test; with some circuits employing a more liberal interpretation towards intervention than others.[299] That test generally places the burden on the union-movant to demonstrate: 1) the timeliness of their application; 2) that the interest the union seeks to protect is significant and is related to the subject of the lawsuit; 3) the resolution of the case may "impair or impede" the ability of the union to protect their interest; and 4) the interest of the union may not be adequately represented by the federal government or the local jurisdiction.[300] The failure to meet one prong of the requirements under Federal 24(a) is fatal to a motion to intervene.[301] This Subpart uses prior court rulings on motions to intervene in police reform cases to evaluate each of the four prongs and demonstrate how the analysis often falls short of giving reform efforts the particular focus necessary.

a. Timeliness

Courts have expressed an interest in ensuring that reform litigation not be delayed or derailed by an untimely assertion of a right to intervene.[302] At least

298. Unions and other interveners also move, in the alternative, for permissive intervention under section (b). Federal Rule 24(b), in relevant part, provides: "(1) In General. On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b).

299. 100Reporters LLC v. U.S. Dep't of Justice, 307 F.R.D. 269, 274 (D.C. Cir. 2014); Ungar v. Arafat, 634 F.3d 46, 50-51 (1st Cir. 2011); Fox v. Tyson Foods, Inc., 519 F.3d 1298, 1302-03 (11th Cir. 2008); "R" Best Produce, Inc. v. Shulman-Rabin Mktg. Corp., 467 F.3d 238, 240-41 (2d Cir. 2006); Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998); Richman v. First Woman's Bank (*In re Richman*), 104 F.3d 654, 658 (4th Cir. 1997); Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837, 840 (10th Cir. 1996); Mountain Top Condo. Ass'n. v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 365-66 (3d Cir. 1995); Cuyahoga Valley Ry. Co. v. Tracy, 6 F.3d 389, 395 (6th Cir. 1993); Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir. 1992); United States v. City of Chicago, 798 F.2d 969, 972 (7th Cir. 1986); New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir. 1984).

300. Ernest E. Shaver, Note, *Intervention in the Public Interest Under Rule 24(a)(2) of the Federal Rules of Civil Procedure*, 45 WASH. & LEE L. REV. 1549, 1551-52 (1988) (outlining four-part test to determine applicant's right to intervene).

301. Nevertheless, the court in *Floyd* continued with its analysis and rejected the unions' arguments that their significant interests of reputation and collective bargaining rights were at stake. Floyd v. City of New York, 302 F.R.D. 69, 76, 82 (S.D.N.Y. 2014).

302. *See* United States v. City of New Orleans, No. 12-1924, 2012 WL 12990388, at

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one court has expressed reluctance to disturb the finality of a police-related consent decree absent a showing of extraordinary circumstances; as that court's language suggests, providing litigants with an assured expectation regarding the finality of the matter is of importance to the judiciary.[303]

Permitting third-parties to intervene in cases at the eleventh hour is not conducive to the swift administration of justice. These considerations are to be generally balanced against the court's ability to use its discretion and be flexible in its determination of the timeliness requirement.[304]

The analysis should not stop there.[305] Efforts to root out pervasive police misconduct have not been successful. This is true despite monetary judgments against individual officers and municipalities under § 1983. Individual efforts to secure large-scale reform have failed in America's highest court.[306] The enactment of § 12601 and the cases that have followed should not be made to suffer obstructionist delays through motions to intervene.

We see a stark example of this type of attempt in *Floyd*, where five unions moved to intervene and modify remedies previously ordered by the district court.[307] The unions sought to intervene in the action nearly six years after the filing of the initial complaint and several weeks after the trial court found that the city's policies and procedures violated the rights of individuals to be free of searches and seizures unsupported by probable cause and executed without a warrant.[308] The unions argued that their motion was timely because the need to intervene did not arise until Mayor de Blasio was elected and city lawyers withdrew their appeal of the court's order.[309] It was at that time, based on the trial court's

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*11 (E.D. La. Aug. 31, 2012).

303. *See* United States v. City of New Orleans, 947 F.Supp.2d 601, 615 (2013) (The city moved to vacate the consent decree under Rule 60(b).).

304. *See* NAACP v. New York, 413 U.S. 345, 366 (1973) (explaining that the timeliness determination is within the sound discretion of the court and "is to be determined from all the circumstances").

305. In evaluating the timeliness factor, no reasonable argument could be made that a motion to intervene is untimely during the phase when the litigation has yet to officially begin. It is important to understand, however, that in most suits initiated by the Department of Justice, a large bulk of the work towards developing the scope of the reform efforts is complete prior to the filing of the Complaint. The investigation into alleged misconduct has occurred. Moreover, in instances where the municipality chooses to resolve the matter instead of trying the merits of the case, the terms of the settlement agreement have been fully negotiated by the parties.

306. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983); Rizzo v. Goode, 423 U.S. 362, 365-66 (1976).

307. Floyd v. City of New York, 302 F.R.D. 69, 76-77 (S.D.N.Y. 2014). The five unions were the Patrolmen's Benevolent Association of the City of New York, Inc., the Lieutenants Benevolent Association of the City of New York, Inc., the Sergeants Benevolent Association, the Detectives' Endowment Association, Inc., and the NYPD Captains Endowment Association. *Id.*

308. For a litigation timeline, see *Floyd, et al. v. City of New York, et al.*, CTR. FOR CONST. RTS., https://perma.cc/5FGA-6S33 (archived January 16, 2019).

309. *Floyd*, 302 F.R.D. at 84; Azi Paybarah et al., *De Blasio on Stop-and-Frisk: 'We*

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remedial orders, that the unions realized their collective bargaining interests had been implicated and remained unprotected.[310] The court pointed to the widely publicized nature of the case, the ability of other stakeholders to assert interest in the case through various filings, and the testimony of some sixty-four members of the NYPD during the liability phase of the case and found the delayed union motions to intervene to be untimely.[311]

b. What Should Qualify as a Significant Interest?

Whether police unions have any significant interest in structural reform litigation should be analyzed under the full context of the litigation. Some courts have generally evaluated this factor on the basis of whether a simple property interest in a job exists because of rules.[312] The appellate court in *United States v. City of Los Angeles* reversed the lower court's finding that the union had no protectable interest in the merits of the underlying action.[313] The appellate court acknowledged that the police unions could not credibly assert a protectable interest in violating the constitutional rights of individuals.[314] That acknowledgement amounted only to a hollow proclamation when the appellate court ultimately found that the union had an interest in the matter because of the request for injunctive relief regarding the alleged unconstitutional conduct of its members.[315] The court went on to identify any potential conflict between the union's Memorandum of Understanding with the City of Los Angeles and the agreed upon consent decree as a source of protectable interest for the union.[316]

The broad analysis employed by the court merely evaluated 1) whether the interest asserted by the union was legally protected, and 2) if that interest was related in some way to the claims asserted by the federal government.[317] It also pointed to the fact that, because the consent decree had not yet been entered and the city's officers were still potentially subject to injunction, the union had interests in: 1) the conflict between their previously negotiated memorandum of understanding and the consent decree, and 2) the ability to present its position on the existence of a conflict between the same.[318]

Changed It Intensely', POLITICO (Dec. 8, 2016), https://perma.cc/5TQ8-HGM7 (explaining that the use of stop-and-frisk in NYC has decreased 97% from its peak in 2011.)

310. *Floyd,* 302 F.R.D. at 84.

311. *Id.* at 76, 80, 84.

312. United States v. City of New Orleans, No. 12-1924, 2012 WL 12990388, at *9 (E.D. La. Aug. 31, 2012) (finding that officers have a property interest in their job, but the proposed Consent Decree does not modify Civil Service system for the officers).

313. 288 F.3d 391, 398-99 (9th Cir. 2002).

314. *Id.* at 398-99.

315. *Id.* at 399.

316. *Id.* at 400.

317. *Id.*

318. *Id.* at 399-400.

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This reasoning by the court loses sight of the forest for the trees. The threat of members being enjoined from engaging in business as usual at the LAPD had passed. After a well-publicized investigation into the Rampart Scandal,[319] the City of Los Angeles and the Department of Justice agreed that extensive reforms were necessary within the LAPD.[320] Those reforms were necessary following large settlements to victims who suffered serious injuries as a result of unconstitutional conduct of its officers.[321] The agreement between the parties had been negotiated, signed, and filed with the federal district court overseeing the matter.[322] The interests of the union and its members at this point amounted to a partial stake in their desire to continue business as usual. Granting them the opportunity to intervene under the circumstances signaled that unions should be afforded an opportunity to negotiate how much impact reform efforts can have on their unconstitutional misconduct. This is beyond the scope of collective bargaining.

The court in *Floyd* looked at this factor of the analysis through a lens more cognizant of the fact that the overall goal of the litigation was to reform police conduct.[323] It rejected the contention made by union officers that they had an interest—reputational or contract-related—in the decree implementation.[324] There, the unions argued that they possessed the requisite interest because their conduct had been enjoined and their reputations had been maligned by the liability ruling made by the court.[325] Rejecting those arguments, the court

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319. *See* Lou Cannon, *One Bad Cop*, N.Y. TIMES MAG. (Oct. 2, 2000), https://perma.cc/SWS5-ZWZW. The Encyclopedia on Race and Crime describes the Rampart scandal, in part:

> There have been many corruption scandals in police agencies across the United States. The Rampart Division scandal in 1999, involving officers from the Los Angeles Police Department, is perhaps one of the worst. More than 70 officers were implicated in misconduct, including unprovoked beatings and shootings, planting and covering up evidence, stealing and dealing drugs, and perjury. The officers involved in the Rampart corruption scandal were driven by power, racism, and greed.

ENCYCLOPEDIA OF RACE AND CRIME 700 (Helen Taylor Greene & Shaun L. Gabbidon eds., 2009).

320. Consent Decree at ¶¶ 1, 6, United States v. Los Angeles, No. 2:00-cv-11769 (C.D. Cal. June 19, 2001), https://www.justice.gov/crt/file/826956/download.

321. *See generally* Paul J. Kaplan, *Looking Through the Gaps: A Critical Approach to the LAPD's Rampart Scandal*, 36 SOC. JUST. 61, 61 (2009) (discussing costs of over $1 billion dollars paid by the City of Los Angeles for the corrupt and illegal conduct of its officers); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 549 (2001) ("Many individuals were subjected to excessive police force and suffered very serious injuries as a result.")

322. Consent Decree at 94, United States v. City of Los Angeles, No. 2:00-cv-11769 (C.D. Cal. 2001).

323. *Floyd,* 302 F.R.D. at 98. *See also Floyd v. City of New York*, CIV. RTS. LITIG. CLEARINGHOUSE, https://perma.cc/GU2Z-GPPC (archived Jan. 18, 2019) (noting that police unions' motions to intervene were denied).

324. *Floyd*, 302 F.R.D. at 82.

325. *Id.*

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reasoned that the city's conduct and policies, not that of union employees, were subject to injunction.[326] The court also found that the city bore responsibility for the unconstitutional conduct of its anonymous employees for whom no personal interest or private conduct was at issue.[327]

c. More Analysis Is Needed When Determining if a Significant Protectable Interest Will Be "Impaired or Impeded"

Determinations by a court that a movant-union has a significant interest are not enough for a successful motion to intervene in structural reform litigation. The movant is required to show that the interest will be negatively impacted or impaired through the resolution of the case.[328] Identifying the precise nature of the interest is essential in structural reform litigation. Cases aimed at rooting out longstanding, systemic police abuses are unlike the typical cases originally contemplated for intervention under Rule 24.

A court that classifies general collective bargaining rights as a protectable, significant interest in police reform litigation will be easily led astray from the true purpose of the agreement to reform police departments. This is true even when consent decree language disavows any intent to impede or impair union collective bargaining rights. We see this in the Ninth Circuit's opinion in *United States v. City of Los Angeles*.[329] That court found no reassurance in the settlement agreement language that disavowed any preemptive power of the decree over officer bargaining rights.[330] And, citing a private sector employment discrimination case,[331] the court emphasized the union's lack of consent to the policy changes and the city's ability to secure declaratory relief in federal court instead of state court as indicia that the ability of the union to protect its interests

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326. *Id.* at 124.

327. *Id.*

328. United States v. City of New Orleans, No. 12-1924, 2012 WL 12990388, at *2 (E.D. La. Aug. 31, 2012).

329. United States v. City of Los Angeles, 288 F.3d 391, 400-01 (9th Cir. 2002).

330. *Id.*

331. *Id.* The court cites *Equal Employment Opportunity Comm'n v. American Telephone & Telegraph Co.*, 506 F.2d 735 (3d Cir. 1974) to support its finding that the union had an interest ensuring that its contract rights were not impaired or impeded. While the case cited involves both a consent decree and the remedying of unconstitutional discrimination on the part of an employer, the similarities cease at that point. The analysis by the court in *City of Los Angeles*, 288 F.3d 391 failed to acknowledge that the underlying case at hand involved the rights of third-party individuals, a governmental employer and a federal investigation that concluded the life and liberty of those third-party individuals had been violated by the union employees. Moreover, the EEOC case referenced by the court was centered on the wages and hours of the individuals potentially affected by the terms of that consent decree. Unlike private sector discrimination cases where seniority and/or discrimination against employees is at issue, the constitutional matters at stake in policing may have only a nominally tangential impact on the wages and hours of law enforcement personnel. In short, the issues central to structural reform litigation in policing are life and liberty, not hours and wages.

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might possibly be impaired or impeded by the consent decree. Contrast that with the decision in *United States v. City of New Orleans.*[332] That court looked at the language of the consent decree stating that the parties would "work with" the Civil Service to implement the required reforms and found that the consent decree would not impair or impact the property interest of the officers.[333] The analysis of the court turned on the fact that while officers in New Orleans have civil service protections, they do not have collective bargaining rights or any similar contract with the City that was placed at risk by terms of the consent decree.[334]

The assertion that collective bargaining rights deserve blanket protections from being impaired or impeded in the police reform context is premature. The scope of what is bargainable should factor into the analysis. The federal court reviewing the terms of the decree is in a prime position to understand the scope of both the terms of the decree and the "wage, hours, and other terms of employment" limitation on bargaining rights. The managerial function of public and private employers is not a concept with which federal courts have no insight.[335] The terms of consent decrees related to policy and training on matters such as use of force and police accountability are outside the bargainable rights of unions. Conflating potential protectable interests that may be impeded without any distinction as to the viability of the asserted interest and impairment evades the issue and can impose unnecessary delays on reform efforts.

d. Union Interests Are Generally Not Aligned with the City—But Why Does the Union Not Share the Federal Government's Interest in Delivering Constitutional Policing?

As a general tenet of labor law, the interests of employers are diametrically opposed to those of their employees.[336] Courts presiding over police structural reform litigation have looked to whether an employer-employee contractual relationship exists when determining if the interests of the movant-union are adequately represented. In the absence of a contract, the government is presumed to represent the interests of its constituents.[337] But which governmental entity,

332. United States v. City of New Orleans, No. 12-1924, 2012 WL 12990388 (E.D. La. 2012).

333. *Id.* at *9.

334. *Id.* at *10.

335. Though litigation surrounding the bargainability of issues under the "wage, hours, and other terms of employment" standard often occurs in state court, cases that implicate federal law are often heard in federal court. *See* Verizon New York, Inc. v. N.L.R.B., 360 F.3d 206, 209 (D.C. Cir. 2004); First Nat. Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 673-75 (1981); Ford Motor Co. v. N.L.R.B., 441 U.S. 488, 498 (1979); Fibreboard Paper Products Corp v. N.L.R.B., 379 U.S. 203, 218 (1964).

336. *See* Bryant, *supra* note 237.

337. United States v. City of New Orleans, No. 12-1924, 2012 WL 12990388, at *10 (E.D. La. 2012).

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federal or state, the union interests have been evaluated against has varied. The *New Orleans* court found that the interests of the union are presumed to be aligned with that of the federal government to ensure constitutional policing was present within the department.[338] The union failed to identify ways in which their interests were not aligned with the implementation of the decree and, therefore, failed to rebut that presumption.[339]

The court in *U.S. v. City of Los Angeles* took a different approach. In that decision, the court agreed with the basic premise and presumption that the interests of citizens are represented by the government.[340] However, unlike the *New Orleans* analysis, the city was identified as the employer with interests different than that of the union.[341] This provided the court with a basis for determining that the existence of a collective bargaining contractual relationship between the city and the union rendered the interests of the union to be inadequately represented by the city-defendant.[342] The court further found that the non-appealable and informal nature of amicus status could not provide adequate protection of union interests.[343]

While it is understood that the employment relationship between unions and their municipal-employer create a presumed misalignment in interests, exploring whether there are shared interests of the unions and federal government deserves appropriate consideration by the courts. There is a reasonable basis for the proposition that the courts should evaluate this issue from the vantage point of the federal government since it is the plaintiff in such consent decree actions. Using that framework, it is illogical for a union to assert that the federal governmental interest in the delivery of constitutional policing differs from that of the union. The stated efforts of the federal government to ensure that members of police departments have clear policies, adequate training, and sufficient resources to do their job would seem to be aligned with the needs and interests of officers. As the moving party, the union should bear the burden of demonstrating support for any position to the contrary.

As discussed in Subpart. III.B.1(b) above, it should not be assumed that there is a significant union interest at stake simply because a collective bargaining agreement exists between the city and union-protected officers. The right of a movant-union to intervene appears to turn on whether they are employed under collective bargaining rights.[344] Outside of the finding by the *New Orleans* court,[345] there appears to be no mention or exploration of the nexus of interests

338. *Id.*

339. *Id.*

340. United States v. City of Los Angeles, 288 F.3d 391, 401-02 (9th Cir. 2002).

341. *Id.*

342. *Id.*

343. *Id.* at 400.

344. *Id.* at 399-400; U.S. v. City of New Orleans, No. 12-1924, 2012 WL 12990388 at *10 (E.D. La. 2012).

345. United States v. City of New Orleans, No. 12-1924, 2012 WL 12990388, at *10

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shared between the police unions and the federal government.

2. The Non-Negotiable Nature of Policies on Use of Force and Discipline

Police unions have not relied solely on motions to intervene to address their discontent with reform efforts aimed at use-of-force and discipline policies. Arbitration is also an impediment to law enforcement structural reform litigation.[346] Unions have used (and undoubtedly have more often threatened to use) the arbitration process to combat remedial orders from courts aimed at correcting unconstitutional practices in their respective police departments. The reform process in Seattle illuminates the use of arbitration to block reform efforts.

a. Police Unions Directly Attack New Use-of-Force Policies

In October 2016, the captains and lieutenants that comprise the Seattle Police Management Association union filed an unfair labor practice complaint with the Public Employee Relations Committee of the State of Washington.[347] Considering that the court approved the settlement agreement in August 2012, the City of Seattle and its police department had been working for four years with the Department of Justice and a court-appointed monitor to implement previously agreed upon reforms aimed at remedying unconstitutional policing in that city.[348] The grievance complained of the City's "unilateral changes" to the police department's use-of-force, accountability, and bias-free policies and trainings, among other areas, without providing the officers with the opportunity to bargain over those revisions.[349] The complaint alleged that the policy change without union involvement violated their right to bargain over terms and conditions of employment.[350]

The Seattle Police Officers' Guild, the department's rank-and-file union, also filed a grievance with the Public Employees Relations Commission regarding a mayoral executive order requiring officers to use body-worn cameras in a selected precinct.[351] The July 2017 mayoral order acknowledged the potential benefits of body-worn cameras: increased accountability, decreased

(E.D. La. 2012).

346. *See* Rushin, *supra* note 210, at 1220.

347. *See* Seattle Police Management, Unfair Labor Practice Complaint to the Public Employment Relations Commission 1-2 (Oct. 20, 2016), https://perma.cc/JF8J-VD6M.

348. Settlement Agreement and Stipulated [Proposed] Order of Resolution at 1-2, United States v. Seattle, No. 2:12-cv-01282 (Aug. 30, 2012) (U.S.A. as plaintiff).

349. *Id.* ¶¶ 44-45; Seattle Police Management, *supra* note 347.

350. Seattle Police Management, *supra* note 347, at 9.

351. City of Seattle, Executive Order 2017-03 (July 17, 2017) (rolling deployment to all precincts within the department was mentioned in the Order but no details regarding timing were provided); Steve Miletich, *Seattle Police Union Files Labor Complaint Over Mayor's Body-Camera Order*, SEATTLE TIMES (July 25, 2017), https://perma.cc/RZ65-N2TU.

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likelihood of injuries to officers and civilians, and increased public confidence.[352] The mayor's order was based on the premise that the use of body-worn cameras was required for the city to successfully implement consent decree requirements. Though the consent decree made no specific mention of body-worn cameras, the mayor highlighted the requirement that the city accurately report use of force in a timely manner and connected such use to the need for officers to use the cameras. While the City acquiesced that the use of body-worn cameras was an issue subject to bargaining, the federal judge noted that the issues needed to be separated.[353] Union officials maintained that they were not against the use of body-worn cameras but, instead, were entitled to use the issue as a negotiating asset in exchange for wages or benefits.[354] Rebuffing the notion that the City could not employ cameras without union approval, Judge James Robart declared that "[t]he citizens of Seattle [were] not going to pay blackmail for constitutional policing."[355]

The issue ultimately was resolved after the union and the City finalized a new collective bargaining agreement later that year; the City ultimately agreed to compensate officers an additional two percent in exchange for wearing body cameras.[356] They did so without any formal judicial intervention or decision from the Public Employees Relations Committee regarding the arbitrability of the issue.[357]

b. Use-of-Force and Discipline Policymaking Excluded from Bargaining

Matters related to law enforcement structural reform litigation should not be heard in arbitration. Courts have cited both local governmental authority and public policy when determining that the topics of discipline and use of force are excluded from bargaining.[358] Some courts use a two-prong test that examines

352. *Id.*

353. Seattle Executive Order, *supra* note 351; Steve Miletich, *Federal Judge Questions Whether Seattle Police-Union Contract in Keeping with 'Spirit' of Reforms*, SEATTLE TIMES (Nov. 5, 2018), https://perma.cc/EX3X-H86W.

354. Jason Shueh, *Seattle Police Union Fights Mayor's Body Camera Order*, STATESCOOP (Aug. 1, 2017, 3:28 PM), https://perma.cc/C3R4-4EBH.

355. *See* Miletich, *supra* note 351. A video of the hearing held by U.S. District Judge James Robart's hearing on bodyworn cameras and union demands can be found at United States of America v. City of Seattle (Part 7) at 14:00-14:56, UNITED STATES COURTS https://perma.cc/V2KT-2ZSY (archived Jan. 16, 2019) ("The citizens of Seattle are not going to pay blackmail for constitutional policing. That's simply the bottom line.").

356. Miletich, *supra* note 353.

357. *See* Steve Miletich, Seattle *Police Union Overwhelmingly Approves Contract with City; Includes Raises, Accountability Reforms*, SEATTLE TIMES (Sept. 20, 2018) https://perma.cc/8A7A-7BPS.

358. New York v. Uniformed Fire Officers Ass'n, 739 N.E.2d 719, 723 (N.Y. 2000); Patrolmen's Benevolent Assoc'n of the City of New York v. New York State Pub. Emp't Relations Bd., 848 N.E. 2d 448, 453 (N.Y. 2006).

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whether law or public policy prevents the issue from being decided by arbitration.[359]

As articulated in *City of New York v. Uniformed Fire Officers Ass'n*, the arbitrability analysis first considers whether the subject matter of the dispute is precluded under law or public policy from being referred to arbitration.[360] The second prong of the test evaluates whether the right to arbitration was appropriately exercised and if the agreement of the parties provided consent for the issue at hand to be subject to arbitration.[361] If a fact-finder determines that law or public policy, as considered under the first prong, precludes arbitration of a particular subject matter, the analysis ends and the parties cannot arbitrate the issue.[362] The court in *Uniformed Fire Officers Ass'n* found that public policy barred requiring the municipal employer to bargain and arbitrate over certain matters.[363] In this case, the court found employee rights to collective bargaining could not be invoked as a means of limiting criminal investigations of alleged illegal conduct by fire officers due to public policy concerns.[364] Those concerns were evidenced through the court's recognition of: state law empowering the government to investigate criminal conduct, the delegation of the power to the investigative agency under the city charter, and—of equal importance—the "significant interest" of the city and its citizens to be assured that its government is free of corruption.[365]

Issues precluded from arbitration are not limited to those regarding criminality. *Patrolmen's Benevolent Ass'n of the City of New York v. New York State Public Employment Relations Board*, involved two arbitration-related cases and consolidated them for the court's consideration. [366] The decision invalidated provisions of collective bargaining agreements with officers in New York City and the Town of Orangetown on the grounds that the respective legislative histories for each local government demonstrated a strong public policy justification for local officials to maintain sole authority over matters pertaining to police discipline.[367]

The New York City contract involved several provisions related to disciplinary procedures for officers employed by the city. Those provisions involved such things as the amount of time officers involved in departmental

359. *Uniformed Fire Officers Ass'n*, 739 N.E.2d. at 721.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 722.

364. *Id.*

365. *Id.* at 722-23.

366. Patrolmen's Benevolent Ass'n of the City of New York v. New York State Pub. Emp't Relations Bd., 848 N.E. 2d 448, 453 (N.Y. 2006); Orangetown, 2 No. 34 (NY Int. Mar. 28, 2006), https://perma.cc/K34D-KG53; Patrolmen's Benevolent Association, 3 No. 32 (NY Int. Mar. 28, 2006), https://perma.cc/K34D-KG53.

367. *Patrolmen's Benevolent Ass'n of New York*, 848 N.E.2d at 453-54.

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investigations were permitted to meet with lawyers prior to being questioned, the inability of the city to revise certain interrogation procedures, and the ability to expunge disciplinary proceedings from employee records.[368] The court admittedly recognized the importance of the collective bargaining rights conferred to public employees under state law and acknowledged the existing tension between that statutory right and the strong public policy related to police discipline.[369]

For the *Patrolmen's Benevolent* court, the coverage of the issue by a local or state law was not dispositive; instead, the court enumerated a number of instances when courts found that the power of local government over certain subject matters could not be subject to collective bargaining even in the absence of laws on the specific subject matter.[370] The existence of legislation pertaining to police discipline served to rebut any presumption of bargaining rights.[371] In doing so, the court traced back to 1888 the public policy in favor of relegating power over the police to the sole authority of local officials.[372] The court plainly and explicitly stated that "public interest in preserving official authority over the police remains powerful."[373]

This provides support for expanding the scope of potential subjects excluded from bargaining beyond only issues of discipline. When the court looked beyond disciplinary issues, the power of collective bargaining agreements seemed less persuasive. This is integral to ensure that the oversight and management of police departments does not become subsumed by the interests of powerful collective bargaining units.

There are other police practices and policies that should not be subject to collective bargain because they are outside the scope of terms negotiable terms. Use-of-force policies have been found to not primarily, directly, or substantially relate to wages, hours or other conditions of employment.[374] Citing Justice Stevens's *Fibreboard* concurrence, the court in *San Jose Peace Officer's Association* found that creation of use-of-force policy is a managerial function best left to lawmakers and local officials because the subject matter involves deciding when the government can take a human life.[375] The court further

368. *Id.* at 449.

369. *Id.* at 450.

370. *Id.* at 451. The court discusses prior rulings related to various non-negotiable responsibilities of boards of education and law enforcement officials. *Id.* In addition to the criminal investigation authority discussed above, the court highlighted the right of police officials to decide the benefit requirements for officers returning to service following an injury and the statutory right of city officials to select officers for promotions. *Id.*

371. *Id.* at 452.

372. *Id.* at 453.

373. *Id.*

374. San Jose Peace Officer's Ass'n v. San Jose, 78 Cal. App. 3d 935, 941-42, 949 (Ca. Ct. App.1978).

375. *Id.* at 948-49. The City of San Jose argued the development of certain police policies are a sole function of the democratic process. That argument was that public policy

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explained that the creation of the policy also requires the delicate balance of considering three competing and equally important interests: 1) "protecting society from criminals"; 2) officer safety; and 3) the "preservation of all human life if possible."[376] In short, police policies related to use of force must comport with constitutional requirements; the bounds and parameters of which should be non-negotiable under any circumstance and certainly not in exchange for wage and hour provisions in collective bargaining agreements.

CONCLUSION

The purpose of legislation such as § 12601, § 1983, and their concomitant litigation in policing is to remedy and prevent the violation of constitutional rights. Ideally, the reform efforts will identify instances of abuse and prevent the continuation of such conduct so as to avoid injury to others. A key component of that cultural reform involves improving officer accountability. Systems and processes must be in place to ensure that responsibility and consequences are fairly meted out for conduct that contravenes established policies and protocol. To effectively remedy past police abuses, there must be thorough consideration, understanding, and evaluation of all internal and external processes involved that affect the delivery and accountability of police services. This is the substantive heart of the injunctive and equitable remedies necessitated under section (b) of 34 U.S.C. § 12601.

The passage of § 12601 provides another path to extricating the deeply entrenched roots of discrimination and racism from our nation's core. Incidents of police misconduct and corruption remain largely undeterred by the threat of civil liability or criminal sanctions. Attempts to utilize the criminal justice system as a means of holding officers accountable for misconduct have proven not to be successful, even when that misconduct has resulted in the extrajudicial taking of a life. Instead, numerous officers have either not been charged[377] or acquitted[378] of criminal charges. Though municipalities have incurred the cost of millions of dollars in civil settlements for police misconduct in § 1983 claims, those same cities have eventually been the subject of federal investigations and consent decrees.[379] With life and liberty—the core of what makes us free Americans—

necessitates that rules on when deadly force is appropriate should not be determined at the bargaining table but should be decided by those elected as representatives of those people against whom such force will be used and those subjected to the consequences of the policy. *Id.* at 942.

376. *Id.* at 946 (quoting Long Beach Police Officers Ass'n. v. Long Beach, 61 Cal. App. 3d 364, 371 (1976)).

377. For a snapshot of some recent statistics, see Jasmine C. Lee and Haeyoun Park, *15 Black Lives Ended in Confrontations with Police. 3 Officers Convicted.*, N.Y. TIMES (Oct. 5, 2018), https://perma.cc/88SK-34D9; Matt Ferner and Nick Wing, *Cops Convicted Of Murder Last Year For On-Duty Shootings*, HUFFPOST (Jan. 13, 2016), https://perma.cc/3KF3-5R6L.

378. *Id.*

379. Settlement Agreement at ¶¶ 1, 4, 7, United States v. City of Cleveland, No. 1:15-

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hanging in the balance, while fully recognizing the extremely difficult task of transforming the culture of an entire police department, it is imperative that our system of government provide a variety of tools to eliminate repeated instances of police misconduct and brutality.

Democratic principles require local governments, through elected and appointed officials, to promote and protect the interests of its constituents. Power to create and manage law enforcement agencies rests with the state. That authority, an implicit derivative of the Tenth Amendment, is deemed essential to the functioning of the state-federal system.[380] As with other governmental responsibilities,[381] the development of policies and implementation of procedures should be an exclusive function of elected and appointed officials not to be delegated. Those responsibilities should also not be tainted by the undue influence of private negotiations with unions. No comparable opportunity exists for civilians and community organizations to effectively lobby for their interests

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cv-01046 (N.D. Ohio 2015); Consent Decree at ¶¶ 1, 4, 7, United States v. Police Department of Baltimore City, No. 1:17-cv-00099 (D. Md. 2017); Consent Decree Regarding the New Orleans Police Department at 1, United States v. City of New Orleans, 2:12-cv-01924 (E.D. La 2012); Eric Heisig, *The High Cost of Police Misconduct: Cleveland Agreed To $13.2 Million In Settlement Over Two Years*, CLEVELAND.COM, https://perma.cc/HNK9-C9K3; Natasha Bertrand, *Why 'It Was Only A Matter Of Time' Before Baltimore Exploded*, BUSINESS INSIDER (Apr. 29, 2015), https://perma.cc/24YT-FV7Z; *How Chicago Racked Up A $662 Million Police Misconduct Bill*, CRAIN'S CHICAGO BUSINESS (Mar. 20, 2016), https://perma.cc/S8VH-CEM4. Although Chicago eventually entered into a consent decree with the State of Illinois and not the federal government, the Department of Justice initiated the investigation that resulted in the consent decree in that city. *See* Aamer Madhani, *Federal Judge Approves Consent Decree to Reform Chicago Police Department*, USA TODAY (Jan. 31, 2019), https://perma.cc/4CTV-T43E. New Orleans has dealt with payouts and criminal charges related to officer misconduct. Historically, more than fifty officers have been prosecuted with at least nine of those cases resulting in convictions. Two of the convicted officers were placed on death row. Prior to the consent decree in New Orleans, the city paid out more than $3.5 million dollars in damages related to police misconduct. *Timeline: NOPD's Long History of Scandal*, FRONTLINE LAW & DISORDER (Aug. 25, 2010), https://perma.cc/8UGM-863X. Those payments do not include settlements that were paid after the implementation of the consent decree for misconduct that occurred before federal intervention. After that time, the City of New Orleans paid $13.3 million for Katrina-related police violence. Campbell Robertson, *New Orleans Settles Katrina-Era Police Brutality Cases for $13.3 Million* N.Y. TIMES (Dec. 19, 2016), https://perma.cc/23RE-UHS8. New Orleans also recently paid $1.5 million for the retaliatory hit ordered by a police officer that killed Kim Groves nearly 25 years after her murder. Emily Lane, *City to Pay $1.5M to Kim Groves' Children, 24 Years*
After NOPD officer Had Her Killed, TIMES-PICAYUNE (Apr. 25, 2018), https://perma.cc/L23R-C45B.

380. *See* Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919); United States v. Renken, 55 F. Supp. 1, 7 (W.D.S.C. 1944) ("The United States lacks the police power, this was reserved to the states by the Tenth Amendment."), *aff'd sub nom.* Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir. 1945).

381. *See, e.g.*, Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n., 358 N.E.2d 878, 880 (N.Y. 1976); Bd. of Educ., Great Neck Union Free Sch. Dist. v. Areman, 362 N.E.2d 943, 946 (N.Y. 1977).

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in the process.[382]

Unlike traditional or typical settlement agreements, consent decrees require specific findings to be made by the court. It is those findings and the resulting order of the court that elevate the legal meaning and effect of consent decrees. In *Buckhannon v. West Virginia Department of Health and Human Resources*, the Court described how the nature of the legal relationship changes between parties in the context of such judicial decrees. [383] In its holding, the Court reasoned that "court-ordered consent decrees create [a] 'material alteration of the legal relationship of the parties.'"[384] Justices Scalia and Thomas opine in their concurrence that consent decrees provide "*some* basis" for classifying "the party favored by the settlement or decree" as the prevailing party.[385] For that reason, the disavowal of liability by municipal governments serves a very limited purpose in the context of consent decrees.

The right to collectively bargain does not bleed into topics reserved for the determination of management.[386] State statutes codifying the public employees' right to collectively bargain implicitly recognize that constitutional rights cannot be forsaken because of collective bargaining provisions.[387] And while the collective bargaining agreements have been generally viewed by some as simply providing additional employment rights to the respective employees, a less-recognized—and perhaps unintended consequence—is that they can infringe upon the rights of the general public.[388]

The Ohio Supreme Court rejected the illogical assertion that the police's collective bargaining rights take precedent over reform efforts. In *Jurcisin v. Cuyahoga County Board of Elections*, the local police union in Cleveland sought

382. The absence of such input highlights the imbalance that exists with regard to the consideration of interests and concerns. There is an assumption that elected officials represent the viewpoints of their respective communities by sheer virtue of being duly elected. The belief that civilians should simply use the ballot box as the sole avenue to express their support or disdain for the acts of local government officials is problematic. First, it assumes that local elections involve more substance and accountability to the public than they do. *See generally* Stephen Rushin, *Police Union Contracts*, 66 DUKE. L.J. 1191, 1206 (2017) (discussing the need to democratize union negotiations and proposing the use of notice-and-comment processes); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015) (exploring the need for something akin to an administrative rulemaking process that includes a public comment period time as local officials create policies for police departments). Such efforts would create a more democratic process by allowing the public to engage and offer their perspective on matters related to policing.

383. 532 U.S. 598, 604-05 (2001).

384. *Id.* at 604 (quoting *Tex. State Teachers v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

385. *Id.* at 618 (Scalia, J., concurring).

386. 5 U.S.C. § 7102 (2017); 5 U.S.C. § 7106(a).

387. And others expressly identify constitutional matters as legal issues excluded from taking a subordinated position to collective bargaining rights. *See, e.g.*, OHIO REV. CODE ANN. § 4117.10(A) (West 2015); Act of June 24, 2004, ch. 69, sec. 5, 2004 Cal. Stat. § 3517.69(b).

388. Rushin, *supra* note 382.

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to block the passage of a charter provision creating a civilian police review board following high-profile instances of police misconduct in that city.[389] The court found that instances of police misconduct and the implementation of disciplinary procedures to address that misconduct fall outside of the "wages, hours, and other conditions of employment" covered under Ohio's collective bargaining statute.[390] The concurring opinion highlighted the language of the relevant state statute that explicitly provides "laws pertaining to civil rights . . . prevail over conflicting provisions of agreements between employee organizations and public employers."[391]

Critics of structural reform litigation do, however, make a point that is worth exploring: efforts to change the practices of governmental institutions and agencies often require extensive court involvement and time.[392] The subject matter and detailed substantive work involved requires resources and a level of complex case management that cannot be resolved quickly. Reform efforts involve the extensive revision of policies, procedures and practices in order to create the organizational structure and cultural shift necessary to achieve the required goal.[393] The result is a multi-year process. In police reform litigation, that crucial time cannot be squandered by attempts to circumvent reform efforts.

Looking forward, two solutions should be considered to avoid the creation of apparent conflicts between structural reform efforts and collective bargaining agreements. The first solution offered pertains to the judicial analysis and rulings on police union motions to intervene. Federal courts overseeing the implementation of remedial police reforms should be reticent to permit unions to intervene. Unions seeking to intervene in the litigation should not be permitted to use the "other conditions of employment" phrase as the basis for inserting their bargaining demands into the reform process. Courts should resist the urge to liberally apply the right of intervention standard for two reasons. The collective bargaining concerns of unions around consent decrees have largely centered on use-of-force and discipline policies. These policy revisions are designed to protect the public from excessive force and to appropriately hold officers

389. 35 Ohio St. 3d 137, 137-39 (Ohio 1988); *see also* Cleveland v. Lester, 143 Ohio Misc. 2d 39, 40 (2007); Ronnie A. Dunn, *The Cleveland Police Review Board: An Examination of Citizen Complaints and Complainants' Experience with the Citizen Complaint Process* 8, https://perma.cc/WY5Z-BJYG (archived Jan. 16, 2019).

390. *Jurcisin*, 35 Ohio St. 3d at 145.

391. *Id.* at 147 (Wright, J., concurring) (quoting OHIO REV. CODE ANN. § 4117.10 (West 2015)).

392. *See generally* Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167 (2017) (exploring the issues faced with winding down injunctions ordered in institutional reform litigation that have lasted for as long as forty years).

393. Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 16 U. CHI. LEGAL F. 615, 622-28 (2016) (identifying factors that make governing police departments difficult. They include: "the [c]ultural [t]radition of [d]eference to the[p]olice" and "[s]erving the [m]ajority" at the expense of the minority.).

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accountable for misconduct. Bargaining provisions and demands on these topics have rightfully been identified as impediments to reforms designed to deliver constitutional policing. Permitting union intervention on the specious basis that they have a significant interest in the litigation only further delays the implementation of constitutional police policies and practices.

Courts overseeing the implementation of reform efforts should do so with keen focus on the purported rights in question when deciding the merits of police union motions to intervene. The law supporting collective bargaining rights is firmly rooted in ensuring the members can negotiate on issues related to wages, hours and other conditions of employment.[394] The power of unions organized to protect the labor interests of law enforcement officers has surged over the last forty years.[395] And while protecting worker rights is essential, all efforts should be made to ensure that the constitutional protections guaranteed to all individuals do not take a back seat to the preferences of organized employee groups.

The phrase "other conditions of employment" should not be viewed as an opening for law enforcement members to use remedies devised to redress unconstitutional policing as an opportunity to negotiate for higher pay or to stymie reform efforts that they believe unfairly malign their reputational interests and authority. As discussed above, managerial interests of employers are not subject to union bargaining.[396] As the court in *San Jose* recognized,[397] the important balance required in the implementation of police reform efforts aimed at protecting individuals from unconstitutional threats to their life and liberty while ensuring officer safety should not be left to the uncertain and varied issues present at the negotiation table. By its very nature, the bargaining process is rife with demands, exchanges, and concessions. It is generally recognized that neither party walks away with everything that they hoped to secure. That is not an appropriate venue for developing policies and procedures aimed at ensuring respective localities meet their obligation to deliver constitutional policing.

For too long, the federal judiciary has gone to great lengths to avoid its responsibility of upholding the constitutional rights of communities harmed by police brutality.[398] It has asserted federalism and standing to avoid using its power and authority to address abusive police tactics on a structural level.[399] Indeed, the relentless constitutional violations have been committed under the watchful eye and affirming voice of the courts. The passage of § 12601 has

394. Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, *in* POLICE REFORM FROM THE BOTTOM UP: OFFICERS AND THEIR UNIONS AS AGENTS OF CHANGE 89 (Monique Marks & David Sklansky eds., 2012) (arguing that employees have a fundamental right to organize over work terms and conditions).

395. *Id.*

396. Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242, at II § 3[a] (2018).

397. *San Jose Peace Officer's Ass'n v. San Jose*, 78 Cal. App. 3d 935, 948-49 (1978).

398. *See supra* Part II.

399. *See* Rizzo v. Goode, 423 U.S. 362, 371-72, 377-78 (1976).

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granted the federal judiciary undeniable oversight to address and remedy systemic police abuses. It took more than a century for the law to be passed. Those communities on the brink of receiving relief should not be waylaid for the sake of purported collective bargaining rights. We know that lives have been lost while details related to motions to intervene have been negotiated between the parties and police unions.[400]

Decisions made by city officials to comply with the requirements of constitutional policing cannot and should not be the subject of contract negotiations with unions. Attempts by unions to intervene on such a specious basis also demonstrates the need for clear and unambiguous local and state laws.

The second solution pertains to state labor laws. Local governments should pass legislation to codify their exclusive authority, especially as it relates to remedying officer misconduct. That legislation would unequivocally leave policy decisions on use of force and police accountability to government officials elected and selected to manage such decisions. Doing so would expressly remove those topics from the possible issues subject to collective bargaining and lay the responsibility for such decisions squarely at the feet of the mayor and the chief of police.

Collective bargaining rights do not extend to all facets of decision-making in policing. Though the majority of states permit law enforcement personnel to organize and negotiate over terms of their employment, those negotiable terms do not generally include managerial decisions. Determining the most effective means for law enforcement to observe and protect the constitutional rights of individuals is the role of municipal government, specifically of those either elected or selected to manage that governmental function. Decisions regarding the appropriate and justifiable use of force—including the amount, timing and type—under the Constitution is a core function for government. It is illogical to allow police interest groups to impede remedial efforts when local government fails at the essential function of protecting the constitutional rights of its citizens.

The same is true of the need for government to set policies aimed at holding officers accountable for instances of misconduct. There is undoubtedly a delicate balance to be made between providing officers with adequate due process during internal investigations and ensuring that the discipline process holds officers accountable for misdeeds. That accountability must be fair, effective, timely, and tailored to the expectations of the community. Striking the necessary balance of these considerations should not be left to contract negotiations with union officials. Indeed, it is difficult to come up with another situation or context that provides potential wrongdoers with the ability to negotiate the process and the extent of their punishment.

While police unions are powerful political entities, collective bargaining

400. Aimee Green, *'Groundbreaking' Settlement on Portland Police Use of Excessive Force Draws Praise, Disappointment*, OREGONIAN (Aug. 29, 2014), http://perma.cc/YH67-TCFY.

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agreements were never intended to contravene the protections afforded by the U.S. Constitution. Over time, however, the scope and practical assertion of those rights have permitted union interests to reach far outside their intended sphere. Indeed, permitting these privately negotiated agreements to include provisions related to police accountability and use-of-force investigations has great potential to infringe on the constitutional rights of the larger public, which all government entities are obligated to uphold. The rights of members of the larger public—who are not party to the agreement—should not be negotiated away at the bargaining table by those involved in structural reform litigation and obligated to meet those settlement terms.

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